TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1016.

GEORGE E. CONEY AND PETER R. CARLL, APPELLANTS,

vs.

ALVRED E. WINCHELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED OCTOBER 5, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Appeal of George E. Coney.*

Circuit Court of the United States for the District of Connecticut.
In Equity.

ALVRED E. WINCHELL
vs.
GEORGE E. CONEY and PETER R. CARLL.

To the honorable the Supreme Court of the United States:

The appeal of George E. Coney, of the city, county, and State of New York, the above-named defendant and appellant, respectfully showeth:

That on the ninth day of May, 1885, there was pending in the superior court in and for New Haven county, in the State of Connecticut, a certain suit, brought by said Alvred E. Winchell, claiming the foreclosure of a certain mortgage upon certain premises belonging to said appellant and for poss-ion of said premises.

That on said ninth day of May, 1885, said appellant filed his petition in said superior court praying for the removal of said
2 suit to the circuit court of the United States next thereafter to be held in said district of Connecticut.

That said petition was granted and said suit removed from said superior court to said circuit; and on the eighth day of August, 1885, the said Alvred E. Winchell filed a motion to remand said cause to said superior court.

That on the seventeenth day of September, 1885, a decree was made and pronounced by said circuit court in said cause, wherein it was in substance adjudged and decreed that said Peter R. Carll was a necessary and indispensable party to said suit, and that there was no separate controversy between the complainant in said suit and the appellant, and that said cause was improperly removed to said circuit court and should be remanded to said superior court, in which decree there was manifest error in this, to wit: That said Peter R. Carll was not a necessary or indispensable party to said suit, and because that the complainant might have obtained all the relief sought in said suit without making said Carll a party thereto; and that there was a separate controversy between said com-
3 plainant and the appellant which could be wholly determined between them, to wit, a controversy as to the foreclosure of the mortgage upon the premises described in said suit, in which controversy the said Carll had no interest; and that there was a further separable controversy between the complainant and the appellent which could be fully determined between them, to wit, a controversy as to the possession of said mortgaged premises by the said appellant; and that said cause was properly removed to said circuit court, no relief being asked therein against said Peter R. Carll, and that said circuit court had jurisdiction of said suit and erred in remanding the same to said superior court.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court and the complaint, petition,

pleadings, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and
4 that the said decree of the said circuit court, and every part thereof, may be reversed and a decree made removing said cause from said superior court to said circuit court, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated at Hartford, this nineteenth day of September, A. D. 1885.

JOHN H. WHITING,
Solicitor.
SIMEON E. BALDWIN,
Of Counsel.

Appeal allowed. Hartford, Sept. 19th, 1885.

N. SHIPMAN, *Judge.*

5 Supreme Court of the United States. In Equity.

ALVRED E. WINCHELL
vs.
GEORGE E. CONEY and PETER R. CARLL.

Know all men by these presents that we, Simeon E. Baldwin and John H. Whiting, both of the city and county of New Haven and State of Connecticut, are held and firmly bound unto Alvred E. Winchell, of the city and county of New Haven and State of Connecticut, in the sum of three hundred dollars, to be paid to the said Alvred E. Winchell, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this nineteenth day of September, A. D. 1885.

Whereas George E. Coney, of the city, county, and State of New York, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Connecticut:

6 Now, therefore, the condition of this obligation is such that if the above-named George E. Coney shall prosecute his said appeal to effect, and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

SIMEON E. BALDWIN. [SEAL.]
JOHN H. WHITING. [SEAL.]

Bond approved. Hartford, Sept. 19, 1885.

N. SHIPMAN, *Judge.*

7 By the Honorable Nathaniel Shipman, one of the judges of the circuit court of the United States for the district of Connecticut, to Alvred E. Winchell, of the city and county of New Haven, in said district of Connecticut:

Whereas George E. Coney, of the city, county, and State of New York, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Connecticut, made in favor of you, the said Alvred E. Winchell, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the nineteenth day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Hartford, in said district of Connecticut, in the second circuit, the 19th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

N. SHIPMAN,
Dist. Judge and one of the Judges of the Circuit Court.

8 ALVRED E. WINCHELL
vs.
GEORGE E. CONEY and PETER R. CARLL.

DISTRICT OF CONNECTICUT, *ss:*

George S. Boltwood, of the city of New Haven, in said district, being duly sworn, saith: That on the 21st day of September, A. D. 1885, at said New Haven, he served on the above-named appellee, Alvred E. Winchell, a copy of the appeal and of the citation filed in this cause with the clerk of the circuit court in and for the district of Connecticut by delivering the same to said appellee personally.

GEORGE S. BOLTWOOD.

Sworn to this 21st day of September, 1885, before me.
[SEAL.] JOHNSON T. PLATT,
United States Commissioner, District of Connecticut.

9 *The Return of the Judges of the Circuit Court of the United States for the District of Connecticut.*

The record and proceedings, with all things concerning the same whereof mention is therein made follow in these words, viz:

ALVRED E. WINCHELL *v.* GEORGE E. CONEY & PETER R. CARLL.

Be it remembered that on the 7th day of September, 1885, there was filed in court a record of a cause removed from the superior court for New Haven county, in the words and figures following, viz:

10 To the sheriff of the county of New Haven, his deputy, or either constable of the town of New Haven, in said county, Greeting:

By authority of the State of Connecticut you are hereby commanded to summon George E. Coney, of the city of New York, county of New York, and State of New York, and Peter R. Carll, of the town and county of New Haven and State of Connecticut, to appear before

the superior court to be holden at New Haven, in and for the county of New Haven, on the first Tuesday of February, 1885, at the January term, 1885, of said court, then and there to answer unto Alvred E. Winchell, of the town of New Haven, county of New Haven, and State of Connecticut, in a civil action wherein the plaintiff complains and says:

1. On May 10th, 1881, Peter R. Carll, of said town of New Haven, owed the plaintiff twenty-one thousand dollars, as evidenced by three promissory notes of said Carll for the principal sums, respectively, of $10,000, $6,000, and $5,000, and each dated May 10th, 1881, and payable to the plaintiff or order five years from date, with interest from May 10th, 1881, at six per cent. per annum, for value
11 received.

2. On said day, by his mortgage deed of that date, said Carll, to secure said notes, mortgaged to the plaintiff a certain piece or parcel of land situated in the city of New Haven, with the buildings and appurtenances thereto belonging, as follows, to wit: Northerly one hundred and seventeen (117) feet, more or less, by Chapel street; easterly about two hundred and sixty (260) feet, more or less, by land of Samuel Hamilton, College street, Ecclesiastical Society, and Charles L. Baldwin; southerly one hundred and seventeen (117) feet, more or less, by land of T. A. Thatcher and P. R. Carll; westerly two hundred and sixty (260) feet, more or less, by the land of said Carll and the heirs of G. F. Warner; which deed is conditioned for the payment of said notes according to their tenor, and is recorded in vol. 345 on page 264 of New Haven land records.

3. Said notes are still owned by the plaintiff, and interest on the same is due to the amount of $4,120, and wholly unpaid.

12 4. Subsequent to said mortgage said Carll conveyed all his title, right, and interest in the above-described premises to the defendant, Coney, who, with the said Carll, is now in possession of the same.

5. The plaintiff claims:

1. A foreclosure of said mortgage.
2. Possession of the mortgaged premises.

The plaintiff recognized in $140 to prosecute.

Of this writ, with your doings thereon, make due return.

Dated at New Haven, this 10th day of January, 1885.

SEYMOUR C. LOOMIS,
Commissioner of the Superior Court for New Haven County.

Order of Notice.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY *et al.*

STATE OF CONNECTICUT, } *ss:*
New Haven County, }

NEW HAVEN, *Jan.* 13, A. D. 1885.

Upon the complaint of the said Alvred E. Winchell praying, for reasons therein set forth, for a foreclosure of mort-
13 gage now pending before the superior court in and for New

Haven county, to be held on the first Tuesday of February, A. D. 1885, it appearing to, and being found by, the subscribing authority that the said defendant, George E. Coney, is residing in New York city, and absent from this State:

Therefore, ordered, That notice of the pendency of said complaint be given by depositing a copy of said complaint and order of notice in the post office, postage paid, at said New Haven, directed to said defendant at 48 Wall street, New York, on or before the 25th day of January, A. D. 1885.

JNA. INGERSOLL,
Clerk of the Superior Court for New Haven County.

NEW HAVEN COUNTY, *ss:*

NEW HAVEN, *January 16th*, 1885.

Then I left in service a true and attested copy of the within writ and complaint with the within-named Peter R. Carll, in said town of New Haven, and on the same day I deposited in the post office, postage paid, at said New Haven, a true and attested copy
14 of said writ and complaint and of the order of notice appended thereto, directed to the within-named George E. Coney, 48 Wall street, New York.

Attest: J. W. POND, *Constable.*

Travel, 3 miles	30
2 services	24
2 copies	1 50
Postage	04
Indorsements	36
	$2 44

Superior Court, New Haven County, January Term, 1885.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY *et al.*

Ordered, That this case be continued for three months from the return day, it being found that no further order of notice is necessary.

By the court:

JONATHAN INGERSOLL, *Clerk.*

Demurrer of Peter R. Carll.

Superior Court, New Haven County, January Term, 1885.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY *et al.*

15 The said defendant, Peter R. Carll, demurs to the complaint, because, on the facts stated, the plaintiff is not entitled to the relief therein sought as against this defendant.

PETER R. CARLL,
By JOHN H. WHITING,
His Attorney.

Demurrer of George E. Coney.

Superior Court, New Haven County, January Term, 1885.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY *et al.*

The said defendant, George E. Coney, demurs to the complaint, because, on the facts stated, the plaintiff is not entitled to the relief herein sought as against this defendant.

GEORGE E. CONEY,
By JOHN H. WHITING,
His Attorney.

Petition for Removal of Cause.

To the honorable superior court, now in session at New Haven, in and for the county of New Haven, in the State of Connecticut:

The petition of George E. Coney, of the city, county, and
16 State of New York, respectfully represents that a certain suit of a civil nature is now pending in said court, wherein the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and in which suit there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, in which Alvred E. Winchell, a citizen of the State of Connecticut, is plaintiff, and one Peter R. Carll, a citizen of said State of Connecticut, is made a nominal defendant, but has no interest in said suit, and said George E. Coney, a citizen of the State of New York, is the only real defendant, and that your petitioner desires to remove said suit from said court to the circuit court of the United States next hereafter to be held in the district of Connecticut.

Wherefore your petitioner now, at the term at which said cause could first be tried, and before the trial of said cause, herewith files a bond, with good and sufficient surety, conditioned as required by the statutes of the United States of America in such case made and provided, and respectfully prays for the removal of said above-described cause from this court, wherein the same is now pend-
17 ing, into said circuit court next to be held in said district as aforesaid.

Dated at New Haven, this ninth day of May, A. D. 1885.

GEORGE E. CONEY,
By SIMEON E. BALDWIN,
Attorney.

Bond on Removal of Cause.

Know all men by these presents that we, George E. Coney, of the city of New York, in the county of New York and State of New York, as principal, and John H. Whiting, of the town of New Haven, in the county of New Haven and State of Connecticut, as surety, are held and firmly bound unto Alvred E. Winchell, of the town of New Haven, in the county of New Haven and State of Connecticut, in the sum of one hundred and fifty dollars, to be paid to the said Alvred E. Winchell, his attorney, executor, admininistrator, or assigns; for

which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seal and dated at New Haven, this ninth day of May, A. D. 1885.

18 The condition of the foregoing obligation is such that whereas the said obligee has heretofore brought a certain suit against the said principal obligor and one Peter R. Carll, which suit is now pending in the superior court in and for the county of New Haven, in the State of Connecticut, and is of such a character and contains a controversy of such a nature as to be removable from said court into the circuit court of the United States for the district of Connecticut, and whereas the said principal ob-igor is about to file in said State court a petition for such removal of said cause to said circuit court:

Now, therefore, if the said principal obligor shall enter in said circuit court of the United States, on the first day of its session, to be held in said district of Connecticut, next after the filing of said petition, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said circuit court shall hold that such suit was wrongfully or improperly removed *removed* thereto, and shall appear in said circuit court, then the above obligation shall be void; otherwise, to remain in full force and effect.

19 GEORGE E. CONEY. [SEAL.]
JOHN H. WHITING. [SEAL.]

STATE OF CONNECTICUT, } ss:
New Haven County, }

NEW HAVEN, *May 9th*, A. D. 1885.

John H. Whiting, the above-named surety, being duly sworn, deposes and says that he resides in the town of New Haven, in the county of New Haven and State of Connecticut, and is worth the sum of not less than three hundred dollars over and above all his just debts and liabilities, and exclusive of property exempt by law from levy of execution.

JOHN H. WHITING.

Subscribed and sworn to, at the time and place above stated, before me.

EARLLISS P. ARVINE,
Commissioner of the Superior Court for New Haven County.

Superior Court, New Haven County. January Term, 1885.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY & PETER R. CARLL.

The plaintiff in said entitled cause objects to the removal
20 of said cause to the circuit court of the United States, as prayed for by said George E. Coney, as by his petion on file, because he says:

First. Because on the pleadings in said cause, the demurrers filed

being manifestly frivolous, so far as questions of law are concerned, there is no such controversy as would entitle said Coney, if he were the only defendant, to a removal of said cause to the circuit court of the United States, or as in fact entitles said Coney to so remove said cause.

Second. Because said Carll is not a nominal defendant in said suit, but has a real interest therein, and the plaintiff cannot, with due protection to his own rights, prosecute said suit without said Carll as a party defendant, and said Carll is a necessary party thereto.

Third. Because there does not arise in said suit a controversy which is wholly between the plaintiff and said Coney.

Fourth. Because the plaintiff in foreclosing said mortgage, as he endeavors to do by his complaint and process in said cause, has no such separate and distinct cause of action on ground of relief against said Coney alone as that a separate and distinct suit might have
21 been brought against said Coney and complete relief been obtained.

Fifth. Because the allegations of the petition for removal do not show that there is any separate controversy in said suit between the plaintiff and said Coney, or that there is any controversy of any kind between the plaintiff and said Coney, or, if so, what the controversy is.

Sixth. Because the said petition for removal discloses no facts or reasons why it should be granted.

By his Attorn*i*es ALLING & WEBB.

Order on Removal of Cause.

STATE OF CONNECTICUT, *New Haven County:*

Superior Court. January Term, A. D. 1885.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY *et al.*

Upon the filing and reading of the foregoing petition for the removal of said above-entitled cause, and of the bond of said petitioner as principal, and John H. Whiting as surety, filed therewith, and on motion of Simeon E. Baldwin, Esquire, attorney for
22 said petitioner, it is hereby ordered that the said petition and bond be and they hereby are accepted; and that this court will proceed no further in said suit, but that the same may be removed into the circuit court of the United States next to be held in the district of Connecticut, in the manner provided by the laws of the United States.

By the court: JONATHAN INGERSOLL, *Clerk.*

Notice of Appeal.

Superior Court, New Haven County. January Term, 1885.

ALVRED E. WINCHELL *vs.* GEOGRE E. CONEY *et al.*

Notice is hereby given that the plaintiff in the above-entitled cause appeals from the judgment rendered therein by said superior

court on the petition of the defendant, George E. Coney, to remove said cause *to* the United States circuit court to the supreme court of errors next to be holden at New Haven, in and for the county of New Haven, on the first Tuesday of December, 1885.

ALVRED E. WINCHELL,
By his Attorneys, ALLING & WEBB.

23 *Plaintiff's Appeal.*

Superior Court, New Haven County. January Term, 1885.

ALVRED E. WINCHELL *vs.* GEORGE E. CONEY *et al.*

In the above-entitled cause the plaintiff appeals from the judgment of said court on the petition of the defendant, George E. Coney, to remove the same *to* the United States circuit court to the supreme court of errors next to be holden at New Haven, in and for the county of New Haven, on the first Tuesday in December, 1885, for the revision of the errors which he claims to have occurred in the trial thereof, and for reason of said appeal he assigns the following, viz:

1. The court erred in granting the said defendants' petition to remove said cause to the United States circuit court.

2. The court erred in overruling the plaintiff's objections to the granting of said petition.

Wherefore he prays for such relief as is provided by law in the premises.

ALVRED E. WINCHELL.
By ALLING & WEBB,
His Attorneys.

24 I certify that the foregoing is a true copy of all the files, records, and proceedings in said cause.

JONATHAN INGERSOLL, *Clerk.*

25 And on the 3rd day of September, 1885, Messrs. Alling & Webb entered their appearance for the plaintiff, and on the 7th day of September, 1885, S. E. Baldwin, Esquire, and J. H. Whiting, Esquire, entered their appearance for the defendants.

And there was filed in said case a petition to remand in the words and figures following, viz:

26 *Motion to Remand.*

In the Circuit Court of the United States for the Second Circuit, District of Connecticut. September Term, 1885.

A. E. WINCHELL *vs.* PETER R. CARLL, GEO. E. CONEY.

In the above-entitled cause the plaintiff moves that the same be remanded to the superior court for New Haven county, Connecticut, from which it was attempted to be removed to this court, because

this court has no jurisdiction of said cause, and among other reasons the plaintiff specially assigns the following reasons why this court has no jurisdiction of said cause, viz:

First. Because in the pleadings in said cause, the demurrers filed being manifestly frivolous so far as questions of law are concerned, there is no such controversy as would entitle said Coney, if he were the only defendant, to a removal of said cause to the circuit court of the United States or as in fact entitles said Coney to so remove said cause.

27 Second. Because said Carll is not a nominal defendant in said suit, but has a real interest therein, and the plaintiff cannot with due protection to his own rights prosecute said suit without said Carll as a party defendant, and said Carll is a necessary party thereto.

Third. Because there does not arise in said suit a controversy which is wholly between the plaintiff and said Coney.

Fourth. Because the plaintiff in foreclosing said mortgage, as he endeavors to do by his complaint and process in said cause, has no such separate and distinct cause of action or ground of relief against said Coney alone as that a separate and distinct suit might have been brought against said Coney and complete relief been obtained.

Fifth. Because the allegations of the petition for removal do not show that there is any separate controversy in said suit between the plaintiff and said Coney, or that there is any controversay of any kind between the plaintiff and said Coney, or, if so, what the controversy is.

Sixth. Because the said petition for removal discloses no
28 facts or reasons why it should be granted.

THE PLAINTIFF,
By his Attorneys, ALLING & WEBB.

29 And thereafter, on the 15th day of September, A. D. 1885, the said motion was fully heard and was argued by the counsel of the respective parties.

And afterwards, on the 17th day of September, A. D. 1885, the court filed its opinion granting said motion to remand in the words and figures following, viz:

30 Circuit Court of the United States for the District of Connecticut.

ALVRED E. WINCHELL *vs.* PETER R. CARLL and GEORGE E. CONEY.

SHIPMAN, *J.*:

This is a motion to remand a cause to the State court upon the ground that it was improperly removed. It was removed under the second clause of section 2 of the act of 1875.

Winchell, the mortgagee, a citizen of Connecticut, brought before the proper State court of Connecticut a complaint for foreclosure of a mortgage of real estate in said State against Carll, the mortgager and maker of the note secured by the mortgage, a citizen of Con-

necticut, and Coney, a citizen of New York, to whom Carll had conveyed the equity of redemption. Carll and Coney are alleged to be in possession of the mortgaged land. The complaint prays for foreclosure and possession.

31 A statute of the State of Connecticut passed in 1878 (Session Laws of 1878, page 314) is as follows:

"SECTION I. The foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage, debt, note, or obligation unless the person or persons who are liable for the payment thereof are made parties to such foreclosure.

"SECTION II. Upon the motion of any party to a foreclosure the court shall appoint three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of said mortgaged property, and the mortgage creditor, in any further suit or action upon the mortgage, debt, note, or obligation, shall recover only the difference between the value of

32 the mortgaged property as fixed by such appraisal and the amount of his claim."

Another statute of said State, passed in 1875 (Session Laws of 1875, page 30), is as follows:

"Whenever any foreclosure or other suit in equity shall be brought asking for any relief in relation to lands the petitioner may, in his bill, pray for the possession of such lands, and the court may, if it grant his petition and find he is entitled to the possession of such lands, issue its execution of ejectment, commanding the officer to eject the person in possession of such lands, and to place the petitioner in possession thereof; and such officer shall proceed with such execution in the same manner as in executions in ejectment at law: Provided no execution shall issue against any persons in possession who are not made parties to the petition."

33 The question depends entirely upon these statutes, or one of them. Did they not exist Carll would have been an unnecessary party. (Swift *v.* Edson, 5 Conn., 531.)

I shall refer only to the statute of 1878:

The complainant, in order to preserve his legal rights against the maker of the note, was compelled to make him a party to the complaint for foreclosure. Complete relief could not be obtained unless this had been done, for although an execution could not be issued against Carll in this proceeding, no judgment could ever be rendered against him unless he had been made a party to this suit.

There is, as in the case of Ayers *v.* Wiswall (112 U. S., 187), "but one cause of action"—the mortgage and the debt which it secured—and it was indispensable, if the complainant wished to preserve the legal liability of Carll upon the note, and to keep unimpaired his own right to complete relief upon his cause of action, to make Carll

a defendant. The question which is here involved comes within the principle decided in Ayers *v.* Wiswall.

34 The motion to remand is granted.

JOHN W. ALLING,
For the Complainant.
JOHN H. WHITING,
For the Defendants.

35 And thereafter, on the 19th day of September, A. D. 1885, there was filed in court a final order and decree of court remanding said cause, which was in the words and figures following, viz:

36 United States Circuit Court, District of Connecticut.

ALVRED E. WINCHELL *v.* GEORGE E. CONEY and PETER R. CARLL.

A certified copy of the record of the above-entitled suit from the superior court of the State of Connecticut in and for New Haven county having been filed herein on the 7th day of September, A. D. 1885, by the defendants, and the plaintiffs having on the said day filed their motion to remand, which motion has been fully argued before the court by Mr. John W. Alling for the plaintiff and by Mr. John H. Whiting for the defendant, and has been decided in favor of the plaintiff, as by the decision of court on file, it is now, upon the motion of Mr. John W. Alling, attorney for the plaintiff, adjudged, ordered, and decreed that the said cause be forthwith remanded for trial to the said superior court from which it was sought to be removed.

Hartford, September 19, 1885.

N. SHIPMAN,
District Judge.

37 I, Edwin E. Marvin, clerk of the circuit court of the United States for the district of Connecticut, in the second circuit, do certify that the foregoing is a full and correct transcript of the complaint, petition, pleadings, proceedings, and decree in said court in the cause of Alvred E. Winchell against George E. Coney and Peter R. Carll.

In testimony whereof I have set hereto my hand and the seal of said court at Hartford, in said district, this 29th day of September, A. D. 1885.

[Seal of Circuit Court, Connecticut.]

E. E. MARVIN, *Clerk.*

Answer of the Appellee.

38 Supreme Court of the United States, October Term, 1885.

GEORGE E. CONEY, Appellant,
vs.
ALVRED E. WINCHELL, Appellee. } No. 1016.

The said Alvred E. Winchell, by his attorney, John W. Alling,

says that there is no error either in the record or proceedings aforesaid or in the giving of said order and decree of the circuit court aforesaid; and he prays that the supreme court of judicature before the justices thereof now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the decree and order aforesaid in form aforesaid given may be in all things affirmed, &c.

JOHN W. ALLING,
Attorney for the Appellee.

39 [Endorsed:] Sup. Court U. S., 1885, Oct'r term. No. 1016. Geo. E. Coney & *al. vs.* Alvred E. Winchell. Joinder in error. Office Supreme Court U. S. Filed Oct. 15, 1885. James H. McKenney, clerk.

Endorsed on cover: Connecticut C. C. U. S. No. 1016. George E. Coney and Peter R. Carll, appellants, *vs.* Alvred E. Winchell. Filed October 5, 1885.

Office Supreme Court U. S.
FILED.
NOV 23 1885
JAMES H. McKENNEY.
CLERK.

116-227

SUPREME COURT OF THE UNITED STATES,

October Term, 1885.

GEORGE E. CONEY,

APPELLANT,

vs.

ALVERD E. WINCHELL,

APPELLEE.

No. 1016. Equity Appeal.

BRIEF FOR APPELLANT.

SIMEON E. BALDWIN,
JOHN H. WHITING,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES,

October Term, 1885.

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STATEMENT.

This is an action brought to the January Term, 1885, of the Superior Court then in session at New Haven, in and for the County of New Haven, in the State and District of Connecticut, by Alverd E. Winchell, a citizen of said State of Connecticut, against George E. Coney, a citizen of the State of New York, and Peter R. Carll, a citizen of said State of Connecticut, for the strict foreclosure of a certain mortgage, alleged to have been given in 1881, upon certain real estate situated in said New Haven, then owned by said Carll, and conveyed by him to said Coney

subsequent to said mortgage. At said January Term the case was continued for three months as against the appellant under the Connecticut Statute, Acts of 1877, p. 195, Sec. 1, and the said Carll was ordered to plead and he thereupon filed a demurrer in his own behalf. At the expiration of said three months the appellant appeared and filed a similar demurrer for himself. Carll took no further action in said suit. Immediately after filing his demurrer the appellant, at said January Term, 1885, the Term to which said action was returnable, and before the trial thereof, filed his petition for the removal of said cause to the Circuit Court of the United States next thereafter to be held in said District of Connecticut, alleging that there was in said suit a controversy that was wholly between the plaintiff and said Coney, and which could be fully determined as between them; and also that said Peter R. Carll was only a nominal defendant and had no real interest in said suit. This petition was accompanied by a bond properly conditioned, and both petition and bond were accepted by said Superior Court, and an order passed removing said cause into said Circuit Court.

The appellee, at the opening of the Circuit Court moved that the cause be remanded to the State Court, and on September 19th, 1885, the Circuit Court passed a decree remanding the cause to the Superior Court, upon the ground that, under the decision in *Wiswall* vs. *Ayres*, 112 U. S., 187, there was in this suit but one controversy, and that Peter R. Carll was a necessary party by reason of a

certain statute of the State of Connecticut, passed in 1878, and hereinafter set out at length.

From this decree the appellant immediately, in open Court, appealed to this Court, filing the proper bonds, which bonds were accepted and the appeal allowed by the Circuit Court.

ERRORS.

Said decree remanding said cause to the Superior Court was erroneous in adjudging that said Peter R. Carll was a necessary and indispensable party to said suit, and that the Circuit Court had no jurisdiction of said suit, and that the same did not contain any separable controversy; because it appears by the petition and complaint that Carll was neither an indispensable or necessary party to the suit, and the plaintiff might have obtained all the relief therein sought, or to which he was therein entitled, without joining Carll as a party thereto, and because there was in said suit a separable controversy wholly between the plaintiff and the appellant which could be fully determined between them, to wit., a controversy as to the foreclosure of a mortgage upon the property of the appellant, and a further separable controversy wholly between the plaintiff and the appellant, which could be fully determined between them, to wit., a controversy as to the possession of said premises.

POINTS.

There is in this case no question as to the citizenship of the parties, or that the amount in controversy is within the jurisdiction of the Circuit Court, the petition filed in time, the bond sufficient, and the copy of the record duly entered in the Circuit Court. The vital question here is, has the plaintiff, by joining Peter R. Carll, a citizen of Connecticut, as a nominal defendant, prevented the removal of this suit, to which the appellant is clearly entitled unless said Carll is a necessary and indispensable party to *this suit, and to every separable controversy therein contained.*

The errors in the decree remanding this cause cannot be condensed into the single question "was Mr. Carll a necessary or indispensable party defendant to the foreclosure suit of Mr. Winchell," as the appellee endeavors to do, thus summarily putting aside half our claim without argument. Nor does that statement present either of the questions with any degree of exactness.

The appellee assumes that the question whether or not Carll is an indispensable party, depends upon whether or not making him such is beneficial to the plaintiff in preserving any rights he may have against Carll.

We say this is, in effect, an action *in rem* to perfect the plaintiff's title to certain real estate and extinguish all equity of redemption any person may have therein, and that no one not possessing such equity of redemption, or some

interest in the property, is, or can be made, a necessary or indispensable party to this suit.

And although the plaintiff may be authorized to join Carll as a defendant, and he thus becomes, by statute, a proper party, that does not make him an indispensable one, or give him any interest in the main controversy, which is still wholly between the mortgagee and the owner of the equity of redemption.

This case can, therefore, be considered as presenting these two questions:

1. Is Peter R. Carll a necessary, that is an indispensable party to *this suit*, actually interested therein adversely to the appellee?

2. Does the suit contain a *separable* controversy which is wholly between citizens of different States, and which can be fully determined as between them?

I.

Is Carll a necessary and indispensable party to this suit, actually interested therein adversely to the appellee?

1.

This case was removed by order of the State Court, and remanded by the Circuit Court as not involving a

dispute or controversy properly within the jurisdiction of said Circuit Court.

Act of March 3, 1875, U. S. Rev. Stat., p. 175, sec. 5.

(1.) In order to justify the remanding of the suit by the Circuit Court on account of the presence of a defendant who was a citizen of the same State with the plaintiff, it must appear that such defendant was an indispensable party, as distinguished from a proper, or even what is ordinarily called a necessary party.

To quote the language of Mr. Justice Blatchford, when he was in this Circuit, in a case arising in the District of Connecticut:

"There may be in a single proceeding in Chancery three classes of parties—formal parties, necessary parties and indispensable parties. * * * * yet a Circuit Court * * * * will dismiss the bill on the ground of its inability to proceed, only when it discovers that the presence of the party is indispensable, and that no relief can be given that does not necessarily involve his rights."

Abbott vs. *American Hard Rubber Co.*, 4 Blatch., 489, 492.

Shields vs. *Barrow*, 17 How., 130.

Barney vs. *Baltimore*, 6 Wall., 280.

Ober vs. *Gallagher*, 93 U. S., 199.

Kendig vs. *Dean*, 97 U. S., 423.

And the same rule applies to causes removed under the Act of 1875.

Barney vs. *Latham*, 103 U. S., 205.
Blake vs. *McKim*, 103 U. S., 336.
Winchester vs. *Loud*, 108 U. S., 130.
St. Louis & San Francisco R. R. Co. vs *Wilson*, 114 U. S., 60.

(2.) While under the Connecticut statutes Carll was a proper party to this suit, he was in no sense either a necessary or indispensable party, and would not have been a proper one, except for those statutes.

Swift vs. *Edson*, 5 Conn., 153.
City Savings Bank vs. *Kutscher*, 52 Conn., 407.

He is made a defendant, not to obtain any relief against him, or on account of any interest that he has or claims in the subject matter of this action, but solely to preserve the right to bring some other action, at some other time, if the plaintiff should ever wish to recover a personal judgment against him upon the notes alleged to be secured by this mortgage. And even this contingent right is dependant upon whether the appraisal, if any is ever had in this action, be greater or less than the amount of indebtedness.

Bates vs. *New Orleans B. R. & V R. Co.*, 16 Fed. Rep., 294.

The statute of 1878, upon which the decree of the Circuit Court remanding this suit rests, is given in the opinion of Judge Shipman (Record, p. 11, fol. 31) and is as follows:

Section 1. The foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure.

Section 2. Upon the motion of any party to a foreclosure, the Court shall appoint three disinterested appraisers, who shall, under oath, appraise the mortgaged property within ten days *after the time limited for redemption shall have expired*, and shall make written report of their appraisal to the clerk of the Court where said foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive *as to the value of said mortgaged property;* and the mortgage creditor in any further suit or action upon the mortgaged debt, note, or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim.

Section 3. This Act shall take effect from and after its passage, but shall not affect any suit now pending.

This statute gives the plaintiff no right to recover any personal judgment in the foreclosure suit against the maker of the note. No such judgment is asked in this suit, and we agree fully with the statement of the appellee (Appellee's Brief, page 15), that no such judgment could be obtained in a foreclosure suit, *and we never claimed it could*, but we did, and do claim that if the plaintiff makes the maker

a party in order to preserve his rights under this statute, and wishes to have the appraisal as therein provided, there must be something in the complaint to indicate it. So much of the form used as is taken from the Practice Book, is appropriate only to the case where the original mortgagor is still the owner of the equity of redemption, and is not intended for a case like this. The framers of those forms supposed that pleaders would insert such different and distinct allegations as were required by the circumstances of each case, and it is provided that the forms "may be used and shall be deemed sufficient in all cases *to which they are applicable*," (Practice Book, page 21, sec. 3).

(3.) We emphatically deny that, as claimed by the appellee (Brief, pages 14, 15, 16, 17), the prayer for foreclosure "covers *everything necessary to be done to preserve the obligation of the debtor* for the balance, if any of the mortgage debt;" that "the relief is the same in its general character as regards either Coney or Carll;" that "the foreclosure of a mortgage under our system, with the mortgagor as a party, does settle every question, of record, necessary to be settled, in order to render a judgment for the deficiency;" that "the plaintiff in a foreclosure case is entitled to all his rights," against everybody he chooses to make a party, and can obtain them in that suit; that the further suit has anything of the "nature of debt on judgment;" that any amount of loose

practice will justify granting an appraisal, *at the instance of the plaintiff*, without a prayer for that specific relief, and proper allegations justifying it; that "the bringing of the complaint of foreclosure is, of itself, under this statute, sufficient to obtain the relief of an appraisal;" that this is "the usual form of complaint, in foreclosure, by our practice" in cases where the mortgagor has conveyed all his interest, and is made a party in order to preserve the right of action against him; or that, so far as this case is concerned, "Any difficulty of that sort is easily remedied by amendment."

We assert that no amendment could be made in the State Court after our petition for removal was filed, and none in the Circuit Court unless that Court acquired jurisdiction.

Railroad Co. vs. *Mississippi*, 102 U. S., 141.

Railroad Co. vs. *Koontz*, 104 U. S., 14.

The bringing of a complaint for foreclosure, like any other complaint, is sufficient in itself, to obtain the relief *actually demanded*, (if the complaint shows the plaintiff to be entitled to it), and no other; and in this case Carll would be bound by the appraisal, if any were ever had, *and by nothing else*. The mere prayer for foreclosure means no more than the "old fashioned, long-winded prayer" formerly used, as well after this statute of 1878

as before, and for which the plaintiff says the present prayer is *a substitute*, to wit, "that the said A. B. be forever barred and foreclosed of all right, title, interest and equity of redemption in and to the premises" The plaintiff seeking equitable relief must specifically demand it, (Practice Book, page 13, sec. 10), and insert the requisite allegations to sustain it.

"The first pleading on the part of the plaintiff shall be known as the complaint, and shall contain a statement of the facts constituting the cause of action, and a demand for the relief to which he supposes himself to be entitled." Practice Book, page 1, section 1.

"When any relief demanded by the plaintiff cannot properly be demanded upon the allegations of the complaint, although these may be sufficient to call for some other relief, the defendant may demur to the relief so improperly demanded." Practice Book, page 17, sec. 11.

Nor can we now consider what form the case may hereafter assume by amendment. If the pleadings or evidence should show Carll to be an indispensable party, the Circuit Court could *then* remand the case.

Stevens vs. *Richardson*, 9 Fed. Rep., 191.

But *now* we must rely upon the facts stated in the pleadings as they are, and in the petition for removal, the alle-

gations of which, as they are not denied, must be taken to be true in deciding the question of jurisdiction.

Removal Cases, 100 U, S., 457–474.
Mackaye vs. *Mallory* 19 Blatch., 165–175.

(4.) Prior to the statute of 1878, the holder of a note or other obligation, secured by mortgage upon property afterwards conveyed by the maker of the obligation, could choose between three courses:

1. He could, and, if the maker were fully responsible, probably would, ignore the security and proceed directly against the maker.

2. He could, and, if the maker were doubtful and the security ample, probably would, ignore the maker and foreclose his mortgage, which would, if sufficient, pay the debt.

3. He could preserve both remedies, first foreclose his mortgage and then sue the maker for the deficiency. In such case the suit did not open the foreclosure. The value of the mortgaged premises, at the time the title became absolute, was found in such further suit, and the plaintiff could only recover for the deficiency.

Gen. Statutes of Conn., Revision of 1875,
page 358, Sec. 2.

In ordinary cases this suit might not be brought for four or five years after the foreclosure, and in case of non-negotiable notes for ten or fifteen years. It was, therefore, often difficult, in such suit, to ascertain the value of the property at the time of foreclosure. To meet this difficulty the statute of 1878 was passed. It furnishes a way in which the value of the mortgaged premises can be ascertained *at the time the title becomes absolute;* provides that such value so found shall be conclusive in any further suit upon the note, authorizes the joining of the maker of the note as a party, so that he can have an opportunity to obtain such appraisal, and be heard as to such value, and bars any further suit against the maker, unless he is so made a party.

And this is the construction given to this statute in a recent case.

The foreclosure suit was brought in 1877, and in 1878, after the passage of this Act, the makers of the note were cited in by supplemental bill. The Court say of the original bill:

"The object of that suit was a foreclosure. The defendants were not necessary parties to it; a valid decree effectually extinguishing the equity of redemption could have been passed without them."

City Savings Bank vs. *Kutscher*, 52 Conn., 407.

And the Court held that the suit remained essentially the same after the supplemental bill was filed as before.

This statute then *permits* the joining of a defendant who, before that, was not a proper party, and ought not to have been joined.

Swift vs. *Edson*, 5 Conn., 531.

It does not make him a necessary or indispensable party, nor give him any right in the property, or interest in the controversy as to its foreclosure.

It does not make him "the substitute owner of the equity of redemption," or give him any right to settle the question "by paying the mortgagee's right to the property."

Nor has it been the practice in Connecticut since this statute to give him such right by the decree, unless in cases where his grantee had assumed and agreed to pay the debt, and clearly such is *not* his right. The statement of our practice in the appellee's brief, pages 10 and 11, is, we think, incorrect and misleading.

The plaintiff, of course, may, if he chooses, allow Mr. Carll or any one else, after the equity of redemption is extinguished, to take the property, on paying the debt, or on any other terms they can agree upon. But we deny the appellee's claim, (Brief, page 14), that joining such person as a party gives him any right to redeem, or makes him a necessary party to this suit, or that under the prayer for foreclosure the Court can give Mr. Carll any such right.

His obligation arises not from his deciding not to take this property, but from his making the notes, and this ob-

ligation can be enforced, as well now as before the statute, by a direct action on the notes. Before the statute, as now, the foreclosure of the property reduced the obligation by the value of the property. By the statute this value is to be ascertained by an appraisal, and it is conclusively presumed to equal the obligation, unless the maker of the note is given an opportunity to be heard as to this appraisal. This gives him no interest in the property, no equity of redemption to be extinguished, no right whatever except the right to have an appraisal. And the appraisal, and only the appraisal, is made final and conclusive in the future action on the obligation.

We therefore decidedly differ from the statement of the appellee's brief, (page 8, point I), and say that, so far as the foreclosure of this mortgage is concerned, or so far as the present suit (which is the only suit before this Court,) is concerned, a suit "could have been brought and *complete relief* afforded without making Mr. Carll a party."

Our claim is not as stated, (Appellee's Brief, page 13, [2]) that because "no specific relief is asked against Mr. Carll therefore he is not a necessary or indispensable party," but that *he is not a necessary or indispensable party because he has no interest in the subject matter of this suit, and will not be directly affected by the decree, and because the plaintiff can obtain all the relief sought, or that can*

be obtained, in this suit as well without as with the presence of the maker of the note.

2.

The appellee claims that Mr. Carll has appeared as a party and shows an interest in this suit.

He says "Demurrers to the complaint were filed by Mr. Coney and *Mr. Carll.*" (Appellee's Brief, page 3.)

"*If Mr. Carll is not an interested party, why is he appearing in the suit and resisting by a separate demurrer the plaintiff's case?*" (Appellee's Brief, page 16.)

"*He appears and denies our right to relief.*" (Appellee's Brief, page 27.)

Mr. Carll's demurrer is that, on the facts stated in the complaint, the plaintiff is not entitled to the relief sought *as against him.*

Record, page 5, folio 15.

The appellee's claim therefore seems to be that when he brings an unnecessary party into a case, by process duly served upon him, and such party appears and says "nothing you have alleged gives you any right to relief against me," this renders him a necessary and indispensable party to the suit and prevents its removal by the real de-

fendant who had not, when that demurrer was filed, appeared to defend in the action.

This is all the action Mr. Carll had taken in the suit at the time it was remanded, and *this appeal was taken by Mr. Coney alone.*

As the appellee has gone at some length into a statement of what has taken place in the State Court where we have been forced against our repeated and constant protest to proceed with this case, (Appellee's Brief, pages 3 and 4), we may be justified in adding that since this cause was remanded, *Mr. Carll has filed a disclaimer of all interest in the property, or as to any of the relief sought in the suit, and a denial of any possession of the property, except as agent for the appellant,* so that the actual interest of Mr. Carll in this suit does not appear to be very strong. And if he has any, it is adverse to the appellant so far as it relates to matters in which the appellant is in any way concerned.

(1.) Upon the question whether or not these obligations are a lien on the property, and, if so, to what extent, his interest is clearly on the same side with the plaintiff, and opposed to the appellant. The more obtained out of our property, the less for him to pay.

(2.) As this foreclosure is for interest only, the amount now found due will not control in any suit for the principal, as claimed in the appellee's brief, page 11.

(3.) Upon the question of time for redemption, his interest is not as claimed in the appellee's brief, page 12, but to have the property applied as soon as possible, and stop interest upon so much of the debt as the property pays.

(4.) The question of appraisal is one in which the appellant can have no concern. The appraisal cannot take place until *after all his interest* in the property has been foreclosed, and therefore, who the appraisers are, or what value they put on the property, is a matter of perfect indifference to the appellant. It is a controversy wholly between the plaintiff and Mr. Carll.

The interest of Mr. Carll, then, if he has any, is not "so bound up with the others that his legal presence as a party is an absolute necessity."

New Orleans vs. *Seixas*, 35 La. An., 36.

Nor are the interests of Mr. Carll and the appellant "so identified and mixed up that they must and should be decided together." Nor in this case would the final decree "depend upon and involve the rights of both parties."

Wilson vs. *Railroad Co.*, 22 Fed. Rep., 3.

When the latter case reached this Court on appeal, it was held properly remanded because the real controversy

was between the plaintiff and the resident defendant upon whom the decree would operate; and the non-resident defendants, who asked the removal, were made parties only in aid of the principal relief, and their separate answer did not *necessarily* introduce a separate controversy.

Railway Co. vs. *Wilson*, 114 U. S., 60.

In this case the conditions are directly reversed. The decree will effect the removing party, and not the resident. The real controversy is between the plaintiff and the appellant, and the resident defendant is made a party only to preserve rights not connected with this suit. The appointment of appraisers is on motion and forms no part of the decree, and this appraisal cannot take place until after the decree has taken full effect.

We can find a much closer parallel in a recent case, where it was claimed the presence of a resident plaintiff defeated the right of removal. The Court asserted and exercised the right to "discarding mere appearances, ascertain who are the *actual* litigants," and laid down what we claim to be the true rule, as follows:

"Although one may be a proper party, yet if he is not an *indispensable* party, he may be treated as a nominal or formal party, and therefore as not standing in the way of removal."

McHenry vs. *New York, P. & O. R. Co.*, 25 Fed. Rep., 65.
Railroad Co. vs. *McComb*, 17 Blat., 371.
Barney vs. *Latham*, 103 U. S., 205.
State vs. *Lewis*, 12 Fed. Rep., 1.
Blake vs. *McKim*, 103 U. S., 336.
Clark vs. *Railroad*, 11 Fed. Rep., 338.
Bacon vs. *Rives*, 106 U. S., 99.

In *Bacon* vs. *Rives*, as in the present case, the plaintiff joined certain parties *in order to preserve future remedies*, and it was held their presence did not prevent the removal of the cause.

3.

The decision of the Circuit Court remanding this cause is based entirely upon this statute and the case of Ayres *vs.* Wiswall, 112 U. S., 187.

The statute does not make Carll an indispensable party to this suit, and this case differs from Ayres *vs.* Wiswall in several important particulars.

That suit was brought by certain citizens of New York against Ebenezer Wiswall, also a citizen of New York, Ebenezer R. Ayres, a citizen of Ohio, Frederick S. Ayres, James S. Ayres, and Charles G. Learned, citizens of

Michigan, and others, whose citizenship did not appear, upon a certain mortgage given by the said Frederick S. Ayres, Charles G. Learned and Ebenezer Wiswall, to secure their *joint* debt.

After the mortgage Ebenezer Wiswall equitably conveyed his interest in the property to Frederick S. Ayres, subject to the debt, which said Ayres agreed to pay, and Learned transferred all his interest in part of the property to Ebenezer R. Ayres, subject to the mortgage, which the three Ayres bound themselves to pay. The bill prayed that the original debtors be decreed to pay the debt, and in default the property sold and proceeds applied for that purpose, and for an execution against said original debtors for any balance remaining due after the property was exhausted. Wiswall and Learned filed separate answers, asking that their grantees be held to be first liable for any money decree.

Frederick and James Ayres disputed the amount of the debt, and offered to pay $20,000.

In this state of the pleading the three Ayres filed their petition for removal. We thus find in this case an action upon a joint indebtedness, asking joint relief, and Ebenezer R. Wiswall, one of the joint debtors, and hence an indispensable party to any such action.

The only object of the suit was to obtain the money due, and the cause of action was the indebtedness itself. Wiswall was made a party, not to preserve the right to bring a future suit against him in which the other defendants

would have no interest, but because the complainants could not get the relief sought, and to which they were entitled, in that suit, without making him a party.

The Court say:

"The suit was brought for the foreclosure of the mortgage, and a personal money decree for any balance that might remain due on the debt after the security of the mortgage was exhausted. The mortgage and the debt it secured presented the subject matter of the controversy in the case. Ebenezer Wiswall was one of the mortgagors and one of the debtors. The relief sought was against him and the other defendants. It involved a finding of the amount due from him and the others who were bound for the payment of the debt, and in a certain event an order for an execution against him, personally, for the collection of the money. The debt was a unit. Whatever sum was due from one was also due from *all who were chargeable with its payment.* There could not be a decree against a part of the defendants for one sum, and against the rest for another. Although Wiswall did not contest the amount of the claim of the complainants as set out in their bill, Frederick S. Ayres, one of the *joint debtors*, did; and if he succeeds in his defense, it will, of necessity, inure to the benefit of Wiswall. The matter in dispute between the parties on the opposite side of the suit to enforce the mortgage, was the amount due on the mortgage debt. The complainants, citizens of New York, are on one side of the suit, and Ebenezer Wiswall, also a citizen of New York, and others, citizens of Michigan and Ohio, on the other. If the claim of the complainants is sustained, the decree will be against all of the defendants. In order that the complainants may get *all the relief that they ask*, and which, upon their showing in the bill, they are entitled to, Wiswall is a necessary and substantial party to the suit, and on the opposite side from them."

The only matter in dispute under the pleadings in that case, when the petition to remove was filed, in which the complainants had any interest, was the amount of the indebtedness, and as to this Wiswall was interested with the other defendants, and against the complainants; there was no dispute as to the existence of the lien, for whatever debt there was, or as to whether a foreclosure ought to be granted. In the present case there is no *joint liability*. The matter in controversy is not the recovery of any money or the existence of any debt. The object of this action is to obtain a foreclosure extinguishing the appellant's equity of redemption in certain real estate belonging wholly to the appellant, and in which Carll has no right, title or interest, and to obtain possession of that property. This is the only relief asked for, and the only relief to which the plaintiff is entitled.

That was an action directly upon the obligation. The mortgage amounted to a mere pledge, and its enforcement was incidental, the plaintiffs had no *title* in the property and sought none; they only asked that it might be sold, and the proceeds applied on their debt. Any surplus belonged to the defendants. This action is not based upon the obligation, but on the *title*. It is for the strict foreclosure of all equity of redemption in the property. No sale takes place. If the time limited for redemption once expires, the plaintiff's title becomes absolute. The property is his, whether worth less than the debt, or ten times the amount of the debt.

"The entire purpose of the plaintiff is in default of payment, to make perfect a title which before was qualified."

Frink vs. *Branch*, 16 Conn., 260–7.

City Savings Bank vs. *Kutscher*, 52 Conn., 407.

"It is equally true that one general right is claimed by the bill—*the extinguishment of the equity of redemption*—unless the parties interested *therein*, or some of them, shall pay the debt within the time limited As the bill seeks, as its leading object, the foreclosure of the mortgage, it was *necessary* that all persons having *such an interest* in the property as to give them the right to redeem, should be made parties respondent.

"*Middletown Savings Bank* vs. *Bacharach*, 46 Conn., 522."

The questions in this case are, whether this indebtedness is a lien upon the property of the appellant, and whether under the allegations of this complaint the plaintiff is now entitled to the relief sought.

In none of these questions has Peter R. Carll any direct interest. Indirectly he might be benefited, if the lien were established, so far as the property of the appellant was taken to pay his debt, but this interest would be adverse to the appellant, and would require that Carll be arranged on the same side with the plaintiff, as opposed to Coney, leaving the appellant the sole party on his side, and thus clearly entitled to remove the suit

Removal Cases, 100 U. S., 457.

No relief is asked against Carll, and the rights of the parties really contending can be fully settled without his presence, and all the relief asked for obtained without affecting his rights.

So far as any controversy involved under the pleadings in this suit, or any relief herein obtainable, is concerned, it could have been brought against the appellant alone, and full and complete relief obtained.

Before the statute of 1878 the mortgagor was not a proper party, and that statute merely makes him such for the purpose of the appraisal therein provided for. There is nothing to show that any such appraisal is contemplated; nor is it generally made. If the property is worth the amount of the mortgage none will be required. It is not to be presumed, without any evidence whatever, that the property which the plaintiff considered security for $21,000, and which it is alleged the appellant bought subject to that mortgage, will be allowed to go for a sum of less than $5,000.

The foreclosure in this case is for interest only, and the appellant demurs because the allegations of the complaint show that none is yet due. We are not now arguing the the demurrer, but as the Appellee, in his brief, (page 4,) has undertaken to state what it admits, we would say, that it does not admit that *per annum* means *annually*, or that the interest, whether due and unpaid or not, is payable before the principal, for the complaint contains no such allegations. If the Court overrules this demur-

rer, and a foreclosure should be granted, the amount found due in this case would not control in any future action against the maker, for that would necessarily be for the full amount of notes with interest to the date of judgment in that case. The only question which can be decided in this suit in which Carll can possibly have any interest, aside from that of the existence of the lien, is the appraisal of this property, and this cannot take place until after this suit is at an end, and all the interest of the appellant in the property is foreclosed, and would in no way concern him.

4.

Is Mr. Carll transformed into a necessary or indispensable party by the Connecticut statute of 1875?

This question is not discussed in the opinion of the Circuit Court, but as the appellee presents it fully in his brief, we cannot permit the erroneous statements therein, both of fact and law, to pass unnoticed.

(1.) We deny the following statements:

"Nor upon the facts of this case could the question of possession be settled by itself even without Mr. Carll as a party, because he was in possession, and *being in possession he had a right of redemption.*"

Appellee's Brief, p. 8, point III.

And "Mr. Winchell was bound to make Mr. Carll a party defendant in order to get the possession of the premises, and in order to foreclose *his right, as possessor, to redeem.*"

Appellee's Brief, page 24, point III.

And "*because he was in possession* he was an indispensable party, in order to afford the plaintiff complete relief, both in regard *to cutting off the equity of redemption*, and as well as the obtaining of possession under our statute."

Appellee's Brief, p. 26, (4.)

We take direct issue with the fallacious argument which runs through the appellee's brief, that if one having no interest in the property is made a party to a foreclosure suit, and is by any means so far a *proper* party as to prevent the objection of multifariousness or misjoinder, he thereby acquires in some mysterious way, an equity of redemption in such property, of which he must be foreclosed, even though his only interest is in some matter of incidental relief.

(2.) We also deny that Coney and Carll are, or are alleged to be, "in *joint* possession."

Appellee's Brief, p. 22.

And that the averment of the complaint is "that both Carll and Coney are in possession."

Appellee's Brief, p. 25.

The complaint does not contain *any* direct positive traversable allegation as to the possession. The only averment is in a relative clause at the end of paragraph 4. The paragraph reads:

"Subsequent to said mortgage said Carll conveyed all his title, right, and interest in the above described premises to *the defendant, Coney, who, with the said Carll, is now in possession of the same.*"

Record, page 4, folio, 2.

Our Practice Act requires that,

"All pleadings shall contain a plain and concise statement of the material facts, on which the pleader relies, but not of the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, *each containing, as nearly as may be, a separate allegation.*"

Practice Book, page 4, sec. 9.

And the forms adopted by the judges, nnder sec. 33 of the Act, and which the plaintiff pretended to follow, (appellee's brief, page 3), provide for a direct, positive allegation as to the possession, in a separate paragraph.

Practice Book, forms 126 and 129, pages 84–85.

Paragraph 4 contains a proper, direct allegation as to the conveyance to the appellant. A denial of the para-

graph would put that allegation in issue, a failure to deny admits that allegation, and admits nothing else. The complaint, therefore, contains, properly speaking, no allegation whatever as to the possesion.

It certainly does not aver any joint possession or any legal possession except that of the appellant.

The Practice Act of Connecticut does not adopt the system of code pleading in its entirety. So far as it does not profess to change the old rules of pleading, they continue in force. One of them is that "no fact can be assumed in favor of the party pleading, except it be *directly* averred, or arises by *necessary* inference; but on the contrary, the construction shall be taken most strongly against him."

Griswold vs. *Mather*, 5 Conn., 438.

The plaintiff's allegation of exclusive title in Mr. Coney is direct, and the next averment, "who, with the said Carll," *is* in possession, naturally imports that Mr. Coney is in possession as owner, with Carll as his agent.

Carll's possession being "with" that of the owner, is presumed to be in subordination to his title, and as his agent.

"*Every presumption is in favor of possession in subordination to the title of the true owner.*"

Huntington vs. *Whaley*, 29 Conn., 391–398.

There being no allegation of any conveyance subsequent to this one from Carll to the appellant, it is a presumption of law, at least in Connecticut, that the title, and, therefore, the legal possession is still wholly in the appellant.

"The excluded evidence showed clearly that a party under whom the defendants claimed, and whose possession they claimed to have been transmitted to one of them, was at a former period in undisputed possession of the premises. If there was nothing else in the case, the presumption would be that *that possession continued until it was regularly transferred to some other by the party so possessed.*"

Hale vs. *Wiggins*, 33 Conn., 100, 104.

"The plaintiff proved, on the trial, that she owned the land in fee. This tended to prove her possession, because *an owner is presumed to be in possession when nothing to the contrary is shown.*"

Noyes vs. *Stillman*, 24 Conn., 15-21.

A person may occupy and use, and have a right to be upon, real estate, without acquiring any legal possession.

Granuis vs. *Cummings*, 25 Conn., 165-170.

(3.) The statute of 1875 is as follows:

"Whenever any foreclosure or other suit in equity shall be brought asking for any relief in relation to lands, the petitioner may in his bill pray for the possession of such

lands, and the Court may, if it grant his petition, and find he is entitled to the possession of such lands, issue its execution of ejectment, commanding the officer to eject the person in possession of such lands, and to place the petitioner in possession thereof; and such officer shall proceed with such execution in the same manner as in executions in ejectment at law; provided no execution shall issue against any persons in possession who are not made parties to the petition."

Public Acts of 1875, p. 30.

This statute gives the Court no power it did not possess before to settle questions of title, it only enables it to grant "full relief by putting the petitioner in possession of the "property after the Court, by the exercise of its ordinary "chancery powers, has determined that he is entitled to it. "Before the statute the practice was for the petitioner to "bring an action of ejectment at the time of petitioning "for a foreclosure. * * * * The object of the statute "was to save a multiplicity of suits by giving a Court of "Equity the power to give complete relief."

Middletown Savings Bank vs. *Bacharach*,
46 Conn., 513, 526.

Even if the allegation of possession by Carll had been positive and direct, the presumption would still be that he was in under the appellant.

If Carll is in possession of the premises at all, it must be in one of three ways; either as adverse to the appellant, as co-tenant with the appellant or as holding under the

appellant, either as his agent in charge of the property, or as his tenant.

Were Carll's possession adverse to Mr. Coney, it would raise a separate controversy in which he would be on the side opposed to the appellant.

There is nothing in the complaint to indicate any joint tenancy, and the title draws the possession to it, and is exclusively in the appellant.

The fact that Carll was the original mortgagor does not affect the question of possession. As to that he stands in the same position as any stranger to the title.

The statute of 1875 is designed to obviate the necessity of two actions, not to oblige the plaintiff to join every one who happens to be occupying the premises, as defendants.

Those only who have the *legal* possession are to be made parties in the action for foreclosure, as they were in the action for ejectment.

The execution issues against them, and any one occupying for or under them will be ejected under that execution.

"But the rights of the tenant have been interposed. It is said, he is liable to be turned out of possession upon the

execution, although he was no party to the judgment, and had no opportunity of defending his title. This is true; and it may be a hardship. But it is one which grows out of the nature of the action, * * * * It should, however, be remarked, that no rights of his are concluded by this judgment. He may in an action hereafter brought, to recover back the possession, show that he has a title paramount to that of the mortgagees."

Middletown Savings Bank vs. *Bates*, 11 Conn., 524.

It does not follow because the appellant is a citizen of New York that he could not be in personal possession of the premises, and liable to personal service. Indeed the complaint, in alleging his possession, *prima facie* imports an actual possession. But if that were not the case, and Carll were not merely his agent, but his tenant in possession of the premises, and properly served as such, still Carll would be only a nominal party, and the appellant the only person in interest.

Belden vs. *Seymour*, 8 Conn., 309.

The action of ejectment lies against the person having the title to the property.

Gen. Stat. of Conn., Rev. of 1875, page 471.

The possession of the tenant is the possession of the

proprietor, and execution against the owner ejects the tenant.

Emerson vs. *Goodwin*, 9 Conn., 422.
Middletown Savings Bank vs. *Bates*, 11 Conn., 523.

The common law action of ejectment, therefore, would not, as claimed by appellee in his brief, (page 25,) be brought against Mr. Carll, but against the appellant. Mr. Carll is not a necessary party to give jurisdiction, not could the Court, by his being made a party, acquire any jurisdiction over the appellant. The land being in New Haven county, the Court would have full jurisdiction of a suit against Mr. Coney alone, whether an action of ejectment or a suit for foreclosure. Our statutes provide that

"All suits wherein the title to land is to be tried and determined, and all actions of trespass *quare clausum fregit*, shall be brought and tried in the county, and if brought before the District Court, in the District, and, if brought before a justice of the peace, in the town *where the land lies;* and all other actions, if brought before the Supreme Court or Court of Common Pleas. shall be brought in that county, and, if brought before the District Court. in that district, and if brought before a justice of the peace, in that town, where the plaintiff or defendant dwells, if they, or either of them, are inhabitants of this State; but if neither of them is an inhabitant of this State, the action shall be brought in the county, or, if brought to the District Court, in the district, or, if brought before a justice of the peace in the town, where the defendant is when the

suit is commenced, or, if the defendant is not within the State, *where the estate is which is attached.*"

Gen. Statutes of Conn., Revision of 1875, page 414, sec. 7.

And to avoid any question as to foreclosure suits, a further Act was passed in 1877, as follows:

"In case of a mortgage or lien upon property situated in this State, where none of the parties having an interest in such property reside in this State, a petition for the foreclosure or redemption of such mortgage or lien may be brought in the county, or if brought to the district court, in the district where the property, or some part of it is situated."

Public Acts of 1877, page 164.

II.

Does the suit contain a separable controversy which is wholly between citizens of different States, and which can be fully determined as between them?

If it contains *one* such controversy it is removable, whether it contain any other or not.

Ins. Co. vs. *Champlin*, 22 Blatch., 334.

The appellee makes the startling assertion that

"The Federal Statute, in question, uses no words of "necessary" or "indispensable" parties. The separate controversy is to be "wholly between citizens of different States," and one which could be "fully determined" in a a suit between them, without the presence, *as parties*, of citizens of the same State, on both sides of the controversy." (Appellee's Brief, page 28, point Second); and then proceeds gravely to argue that a party whose interest in the suit is so slight that the Court would render judgment in his absence, becomes so indispensable, if present, as to deprive the Court of jurisdiction, (Appellee's Brief, page 29.)

But in the construction of these removal statutes, from that of 1879 to the present one, this Court has uniformly held that the presence of a mere nominal or proper party did not prevent the removal of the suit, or render the controversy any the less "wholly between citizens of different States;" that one suit, especially in equity, may contain many controversies affecting different parties; and that, in order to prevent removal, the resident party must be *necessary or indispensable*, not only to the suit, but to the controversy.

Wood vs. *Davis*, 18 How., 468.
Removal Cases, 100 U. S., 457.
Barney vs. *Latham*, 103 U. S., 205.
Blake vs. *McKim*, 103 U. S., 336.

Hyde vs. *Ruble*, 104 U. S., 409.
Bacon vs. *Rives*, 106 U. S., 104.
Railway Co. vs. *Wilson*, 114 U. S., 60.

We do not understand that the remanding a case removed into the United States Circuit Court depends upon the question whether it could be originally brought then.

The Removal Acts were intended to extend the jurisdiction of the United States Courts, and cases are frequently brought in the State Court, and then removed by the plaintiff to prevent any question of original jurisdiction.

Railroad Co. vs. *Central Trust Co.*, 23 Fed. Rep., 513.
Railroad Co. vs. *Hart*, 114 U. S., 654.

But we think the interest of Mr. Carll in this case is so shadowy and slight that this case with him as a party could have been originally brought in the Circuit Court.

Certainly it could have been there brought against the appellant, and Mr. Carll afterwards *made a party*, which is all the statute of 1878 requires, without divesting the United States Court of its jurisdiction.

Stewart vs. *Dunham*, 115 U. S., 61.

The appellee reiterates the claim that the question of Mr. Carll's personal indebtedness is involved in this case, (Appellee's Brief, pages 31, 32, 33.)

Whether Mr. Carll is an indispensable party to this suit, or any controversy herein contained, depends upon the facts alleged in the pleadings of the suit at the time of removal. These include the petition for removal, the allegations of which, so far as they are uncontradicted, are to be taken as true, and will prevail over those of the complaint.

Gold Washing and Water Co. vs. *Keyes*, 96 U. S., 199.

Mackaye vs. *Mallory*, 19 Blatch., 165–175.

"The controversy in a suit is the one which is actually presented, not the one which might have been."

Boyd vs. *Gill*, 19 Fed. Rep., 148.

It depends upon "*the status of the parties and the nature of the relief asked at the time of application.*"

vs. *Thurber*, 115 U. S., 56.

We think this case presents one main controversy, to which all other controversies are incidental, *i. e.*:—a con-

troversy is to the foreclosure of the mortgage, which is wholly between the mortgagee and the owner of the equity of redemption, and to which no one else can be an indispensable party.

Corbin vs. *Van Brunt*, 105 U. S., 576.
Railroad Co. vs. *Central Trust Co.*, 23 Fed. Rep., 513.

This controversy is wholly between the plaintiff and the appellant, who are citizens of different states, and can be fully determined between themselves. In this Mr. Carll is not interested, as he has no right, title or interest in the subject matter.

The case also presents another controversy which is so far dependent upon the main controversy that the Court can grant no relief in this unless it grant the petition for foreclosure, *i. e.*:—a controversy as to the possession of the mortgaged premises.

This controversy is also wholly between the plaintiff and the appellant, the only party who has any legal possession or who is alleged to be in possession, and can be fully determined as between them without the presence of Mr. Carll.

Each of these controversies presents "a separate and distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded.

as to such cause of action, with all the parties on one side of that controversy, citizens of different states, from those on the other."

Frazer vs. *Jennison*, 106 U. S., 194.
Ayres vs. *Wiswall*, 112 U. S., 192.

As we understand it, these are the only controversies presented in this case, and as Mr. Carll is not an indispensable party to either of them, he is not a necessary or indispensable party to the suit.

But should the Court be of opinion that by the Connecticut statute other controversies were added to the suit, as to the appraisal of the property, or Mr. Carll's future liability, aud that he thereby became more than a nominal party to the suit, still he would acquire no interest in the two former controversies. The case would then present certain controversies in which Mr. Carll had no interest, and others in which the appellant had no interest, and whether these controversies were properly joined in one action or not, would not affect the jurisdiction of the United States Court.

The case would still "be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states, on one side, and citizens of other states on the other, which can be fully determined, without the presence of any of the other persons, to the suit as it has been begun."

Frazer vs. *Jennison*, supra.
Ayres vs. *Wiswall*, supra.

"The liability of each defendant is several, and the complainant cannot convert a controversy which is wholly between him and *each* of the two defendants, into one between itself and *both* defendants, by treating it as joint in the prayer for relief. It is only when the cause of action is founded upon a *joint and several* liability that the plaintiff may, at his election, proceed against both defendants jointly, or each severally."

Chicago & A. Ry. Co. vs. *New York L. E. & W. R. Co.*, 24 Fed. Rep., 516.
Boyd vs. *Gill*, 19 Fed. Rep., 145.

The Court, as a Court of Equity, might direct a separate trial of each issue, and Mr. Carll's connection with either one would not render him a necessary party to any other.

Pacific Railroad Removal Cases, 115 U. S., pages 22, 23.

Even if the statutes of Connecticut, instead of merely permitting, required the joinder of Mr. Carll as a party to the suit, and provided that every question connected with these notes and the mortgage should be tried together, it would not prevent the removal of this suit. That depends upon the constitution and laws of the United States, not

on any action of the State of Connecticut, or of the plaintiff. If the State require the plaintiff, or he see fit, of his own volition, to join in one suit controversies between himself and Mr. Carll, with controversies between himself and the appellant, he cannot by such joinder deprive the appellant of his right to remove.

Ellerman vs. *New Orleans*, 2 Woods, C. C., 120.

Pacific Railroad Removal Cases, 115 U. S., 23.

There is nothing in this suit to bring it "within" that class of foreclosure cases in which the liability of the mortgagor, for a possible deficiency, is to be preserved or enforced," as claimed in the appellee's brief, page 32.

Even if the plaintiff had brought a suit in which he sought "to preserve and settle his rights against such a mortgagor," to which the mortgagor was an indispensable party, that would not make him such to every controversy in the suit. His relation to each separate controversy depends not upon the statute, but upon his interest in the subject matter of such controversy.

If the suit contains a single controversy wholly between the plaintiff and the appellant, and which can be fully determined as between them, that controversy renders the whole suit removable, even though it contain matters

upon which the Federal Court cannot pass, or which render it liable to the objection of misjoinder or multifariousness. That is for the trial Court to pass upon, but cannot deprive the appellant of his right to try *his* controversy in the Court of the United States.

Barney vs. *Latham*, 103 U. S., 205.
Pacific Railroad Removal Cases, 115 U. S., 1.

This question is not whether "the Federal Courts are anxious to acquire jurisdiction," or desirous of avoiding it, but *is the appellant entitled to try the controversy or controversies which are wholly between him and the appellee, in the Courts of the United States?*

This is a right given by the constitution, and regulated by the laws of the United States, and cannot be taken away by the State or the plaintiff.

Nor is it dependent upon the convenience of the plaintiff, or the delay or rapidity of obtaining a decree.

When removed to the Circuit Court, the case will proceed at least as rapidly as in the State Court, and the plaintiff, who might have brought it to the United States Court originally, (under the Act of March 3, 1875, sections 1, 8), or, to avoid any question of jurisdiction, removed it there himself, has no reason to complain of the delay occasioned by his selecting another tribunal.

To sum up our position in a word, it is this:

The controversy as to whether the equity of redeeming the mortgaged premises from Mr. Winchell, which is now vested in Mr. Coney shall be cut off, can be fully determined as between *them*, without reference to any remedy the mortgagee may or may not thereafter have against the original mortgagor, Mr. Carll.

The controversy as to whether, in case of a foreclosure and of its becoming absolute, the possession of the mortgaged premises, which the plaintiff says Mr. Coney has, shall be taken from him and given to Mr. Winchell, can be fully determined as between *them*, without reference to any remedy he may have against Mr. Carll.

Mr. Carll is, by statute, a proper party to the suit, but he is not a necessary party to either of these controversies between Mr. Winchell and Mr. Coney. His presence as a co-defendant cannot prejudice Mr. Coney's right to remove, unless he is not only a proper party to the suit, but an indispensable party to each of these controversies. If he is not such an indispensable party then the Circuit Court erred in reversing the order of the State Court, and the order of remand should be reversed on this appeal.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1016.

ADVANCED UNDER RULE 32.

GEORGE E. CONEY,

Appellant.

vs.

ALVERD E. WINCHELL,

Appellee.

BRIEF OF APPELLEE.

JOHN W. ALLING,

Of Counsel.

Hoggson & Robinson, Law Printers, New Haven.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

NO. 1016.

GEORGE E. CONEY,
Appellant,
vs.
ALVERD E. WINCHELL,
Appellee.

An appeal from an order of the Circuit Court remanding a cause to the Superior Court.

ADVANCED ON MOTION OF APPELLEE.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Alverd E. Winchell, a citizen of Connecticut, brought his action to foreclose a mortgage, for non-payment of interest, to the Superior Court of Connecticut, and made as defendants thereto Peter R. Carll, a citizen of Connecticut, the maker of the mortgage notes, and still indebted thereon, and George E. Coney, a citizen of New York,

the assignee from Carll, and the owner of the equity of redemption.

Mr. Winchell also sought to obtain possession of the mortgaged premises, and averred, in the complaint, that both Carll and Coney were in possession of the premises.

Record, pages 3 and 4. Fols. 10–13.

A statute of Connecticut, passed in 1878, (Session Laws of 1878, page 341,) is as follows:

"SECTION 1. The foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt, note or obligation, unless the person or persons, who are liable for the payment thereof, *are made parties* to such foreclosure.

SEC. 2. Upon the motion of any *party* to a foreclosure, the Court shall appoint three disinterested appraisers, who shall, under oath, appraise the mortgaged property, within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal, to the Clerk of the Court where such foreclosure was had, which report shall be a part of the files of such foreclosure suit, and such appraisal shall *be final and conclusive* as to the value of said mortgaged property;

And the mortgage creditor in any *further* suit or action upon the mortgage debt, note or obligation, shall recover only the *difference between the value of the mortgaged property, as fixed by such appraisal*, and the amount of his claim."

Connecticut maintains the ancient practice of strict foreclosure, and does not allow a sale of the mortgaged property in foreclosure proceedings.

Another statute of Connecticut, (Session Laws of 1875, page 30,) is as follows:

"Whenever any *foreclosure* or other suit in equity, shall be brought, asking for any relief in relation to lands, the petitioner may, in his bill, pray for the possession of such lands, and the Court may, *if it grants his petition*, and find he is entitled to the possession of such lands, issue its execution of ejectment, commanding the officer to eject the person in possession of such lands, and to place the petitioner in possession thereof;

And such officer shall proceed with such execution, in the same manner as in executions in ejectment at law. *Provided, no execution shall issue against any persons in possession who are not made parties to the petition.*"

Record, page 11. Fols. 31–33.

The foreclosure proceedings are in the usual form according to the practice of Connecticut.

Vide "Practice Act of Connecticut, with Rules and Forms," pages 83–87.

Demurrers to the complaint were filed by Mr. Coney and *Mr. Carll.*

Record, pages 5 and 6. Fol. 15.

It was at first believed by us, that there was no point whatever to the demurrers.

After the remanding of the cause, in the progress of the case in the State Court it was discovered that the ground of the demurrer was, that though the complaint says, that "interest on the said notes" is due to the amount of $4,120, and unpaid, yet that the pleader in using the phrase "per annum" in the first paragraph

of the complaint, could not be understood as meaning "annually," or "by the year," which it must mean, in order for the interest to be *due*, but the phrase with its context, must necessarily convey the idea of interest, at *the rate of* six per cent. per annum, thus interpolating the words "the rate of;" and that the pleader must be understood as averring, that the notes were for five years, with interest, payable at maturity of notes, which would not happen until May 10, 1886!

But the demurrer admits the substantial truth of the averment that $4,120 of interest is due and unpaid, and, therefore, the demurrer must admit, that the "per annum" of the complaint means "annually."

Par. 3, complaint. Record, page 4.

But the notes, in fact, called for the payment of interest annually, and whatever ambiguity of pleading there may be, has been corrected by amendment in the State Court, since the remanding of the cause.

But this ambiguity of averment if it exists, which we deny, and whether since amended or not, could not affect the question of the jurisdiction of the Circuit Court.

The controversy was for the foreclosure of the mortgage, *by reason of there being over* $4,000 *of interest claimed to be "due" and "unpaid."*

Nash *vs.* Adams, 24 Conn., 33, 39.

The three assignments of error are:

(1.) "That said Peter R. Carll was not a necessary or indispensable party to said suit, (and) because that the complainant might have obtained all the relief, sought in said suit, without making said Carll a party thereto."

(2.) "That there was a separable controversy between said complainant and the appellant, which could be wholly determined between them, to wit:—a controversy as to the foreclosure of the mortgage upon the premises, described in said suit, in which controversy the said Carll had no interest."

(3.) "That there was a further, separable controversy, between the complainant and the appellant, which could be fully determined between them, to wit:—a controversy as to the possession of said mortgaged premises, by the said appellant."

Record, page 1. Fols. 2–3.

These three assignments, in substance, cover but this single question:

WAS MR. CARLL A NECESSARY OR INDISPENSABLE PARTY DEFENDANT TO THE FORECLOSURE SUIT OF MR. WINCHELL?

It cannot be successfully disputed, but that, under the

Conn. Statute first cited, Mr. Winchell would be bound to make Mr. Carll a party to the foreclosure, or, by not doing so, release him from personal liability on the mortgage debt. Mr. Carll was therefore a necessary and indispensable party to the suit.

Mr. Winchell had the right, and for the protection of his interests was bound, to cite him in as defendant.

"It does not necessarily follow that a controversy is wholly between the plaintiff and each one of several defendants, and can be fully determined as between them, merely because such a controversy, might have been presented, if the plaintiff had elected to present it in that form.

"The controversy in a suit, is the one, which is actually presented, not the one which might have been.

"It is not wholly between the plaintiff and one of the defendants, because it might have been, if the plaintiff had so elected."

Boyd *vs.* Gill, 19 Fed., Rep., 148–9.

But it is said, that though this may be so, Mr. Carll was not such a necessary or indispensable party, that his citizenship would prevent the other non resident defendant, from removing the cause to the Circuit Court.

There ought to be, and is, a clear rule which this Court has established on this subject.

To obtain a removal of a suit with residents on both sides, and a non resident, on one side, in behalf of a non resident, there must be in that suit:

"A separate and distinct cause of action, on which a *separate and distinct suit might have been brought, and complete relief afforded*, as to such cause of action, with all the parties on one side of that controversy, citizens of different States, from those on the other.

"To say the least, the case *must* be one *capable* of separation into parts, so that, in one of the parts, a controversy will be presented, with citizens of one or more States, on one side, and citizens of other States on the other, which can be *fully* determined, *without the presence* of any of the other persons, to the suit as it has been begun."

Frazer *vs.* Jennison, 106 U. S., 191–4.

Ayres *vs.* Wiswall, 112 U. S., 187, 192.

I.

Confessedly no separate and distinct suit for the foreclosure of this mortgage, could have been brought, and *complete* relief afforded, without making Mr. Carll a party.

II.

Nor was this suit capable of division into parts. The controversy was single, *i. e.*, the foreclosure of the mortgage.

If that was granted, the Court on its equity side, might further grant, as part of its function, to afford *complete* relief, the possession of the premises.

A suit in equity will not lie, merely, for the possession of lands, and in this suit, the question of possession cannot be settled, *except as part of the general question of foreclosure.*

III.

Nor *upon the facts of this case*, could the question of possession, be settled by itself even, without Mr. Carll as a party, because he was in possession, and, being in possession, he had a right of redemption.

I.

Mr. Carll is an indispensable party to the foreclosure in order to preserve the plaintiff's rights, and the interest of Mr. Carll in such foreclosure, is personal to himself and opposed to the plaintiff.

(1.) In any proceeding, in which property, pledged by its owner, for his debt, is to be appropriated to the credit and on account of that debt, the debtor is necessarily an interested party.

The amount of his debt, and the manner of the appropriation, are of vital interest to him.

It is true that under the old rule in Connecticut, (Swift *vs.* Edson, 5 Conn., 531), the mortgagor who had conveyed away his equity of redemption, was not a necessary party to the foreclosure of the mortgage. But this was because under the old rule in Connecticut, the appropriation by foreclosure of the mortgaged premises was an *extinguishment* of the debt.

Swift *vs.* Edson, *supra.*

Swift's Dig., vol. 2, side page 198, (top pages 218–219.)

But this rule was repealed by statute in 1833.

Vide marginal note, Rev. Stat. of Conn., 1875, page 358.

But though by statute, the foreclosure was no longer, necessarily, an extinguishment of the mortgaged debt, the practice of not making a mortgagor, who had conveyed away his equity of redemption, a party to foreclosure proceedings, continued. And the singular anomaly was presented, that a creditor could apply to a Court, to have the debtor's pledge, applied on account of the debt, without giving him a chance to be heard, in cases, where he had conveyed his interest in the pledge, but holding him still liable for whatever the pledged property did not pay.

It was to remedy the obvious injustice and inequity of this practice, that the statute first cited was passed.

Under that statute, when the mortgagee makes the original mortgagor, who has ceased to be the owner of the equity, a party defendant, it is distinct unequivocal notice to him, that he will remain liable on the mortgage debt, for whatever the mortgaged estate does not pay, and under that statute, the original mortgagor still remains, in his relation to the mortgagee, a mortgagor.

If the owner of the equity will not redeem, the original mortgagor has the right, to put forever at rest the question, whether the property pays the debt or not, by paying the debt himself, and taking the mortgagee's right to the property.

It has been the practice, since the statute of 1878, to

provide, in the decree, that the original mortgagor, may, so to speak, redeem, and clearly such is his right.

No question has arisen under this Statute but that the mortgagor is an indispensable party in foreclosure proceedings, unless the mortgagee will elect to take the mortgaged premises in satisfaction of his debt.

If it is sought to preserve the debt against the mortgagor, he must be made a party, and as a party, *he must have all the rights, legal or equitable, which should belong to him, in defending or securing him against the liability which the plaintiff seeks to impose upon him.*

In cases arising under this statute the original mortgagor, is interested in the foreclosure, not as a garnishee or stakeholder, but in his own right. It is a *personal* interest.

He is, so to speak, the substitute owner of the equity of redemption.

He is personally interested, as to the amount of the *debt* then due, whether and to what extent it has been reduced by payments, by the owner of the equity, or by himself, or in disputing the validity of the debt. It is for his in-

terest to make the debt nothing or as small as possible, and that interest is antagonistic to that of the plaintiff.

In limiting the time for redemption, his interests are naturally for the longer period, giving him and the owner of the equity more chances, to find the ways and means to pay the debt, whereas the mortgagee probably will be claiming a shorter period.

In this question, as in all the questions, the interest of the original mortgagor is entirely personal. It is to obtain, what he thinks will make for his own personal advantage.

So in the appraisal of the property his interests are directly antagonistic to that of the plaintiff, and personal to himself.

"On an application to remove the whole suit, one is an indispensable party, whose interest therein is so bound up with the others, that *his legal presence as a party* is an absolute necessity."

New Orleans *vs.* Seixas, 35 La., Ann. 36.

"But if the interests of the parties, on the side of the party, desiring the removal, are so identified and mixed up, that they must and should be decided together, and the final decree must depend upon and involve the rights of both parties, the removal cannot be had."

Wilson *vs.* Railway Co., 22 Fed. Rep. 3.

(2.) It is said, however that no specific relief is asked against Mr. Carll, and therefore he is not a necessary or indispensable party.*

Passing, for the present, the obvious and conclusive reply that possession is claimed, and that both Carll and Coney are alleged to be in possession, it should be noted, that in the process of strict foreclosure, no *specific affirmative relief is asked against anybody.*

However severe the contest may be in the suit, no judgment for costs is obtained by the plaintiff against Carll or Coney.

Swift's Digest of the Laws of Conn., vol. 2, side page 197, top pages 217, 736, 787.

The code, and the rules and forms established under it by the judges, have abolished the old fashioned, long-winded prayers for relief in foreclosure suits, and substituted in their place the simple and comprehensive prayer for "the foreclosure of the mortgage."

Practice Act of Conn., with rules and forms, adopted by the Judges, pages 83 and 87, and 23.

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*In this case it is on motion of the appellee that the cause is advanced, and a speedy determination claimed, of the question of jurisdiction.

The appellee is, therefore, obliged to furnish his brief to the appellant, and we must anticipate the claims of the appellee as much as possible, from our knowledge of them, as made in the Court below.

This prayer covers everything, necessary to be done, to appropriate the mortgaged premises, to the mortgage debt, and to preserve the obligation of the debtor, for the balance, if any of the mortgage debt.

Under this prayer, the amount of the debt will be ascertained, and a time fixed for Coney, to pay, *if he chooses*, or lose his interest in the property, but he cannot be compelled to pay the debt or costs.

Under this prayer, the same debt will be ascertained, and a time fixed, for Carll, to pay, *if he chooses*, in case Coney does not pay, and so compel him to decide whether or not he will put an end to the question whether the property will pay his debt, by paying it, and taking the property; and in case he does not pay, his obligation to pay what the property does not pay, is preserved, by his being a party to the proceedings, and would not otherwise be preserved.

The relief, sought by the general prayer of foreclosure, is the *same in its general character, as regards either Coney or Carll*, and in foreclosure cases the general prayer for relief, is sufficient, even, to appoint a receiver of rents and profits.

Schreiber *vs.* Carey, 48 Wis., 208.

(3.) But it is said, we might have made it appear that Carll was *more* necessary as a party, by praying for a judgment against him, for the possible deficiency between the appraisal and the debt.

(*a.*) It ought to be and is a sufficient answer to say, that the question of removability, does not depend upon the *comparative* or *superlative* degrees of the words "necessary" and "indispensable."

(*b.*) We deny, however, that such a judgment against Carll for such possible deficiency could be obtained in a foreclosure suit in Connecticut.

Opinion of Judge Shipman. Fol. 33.

Certainly the statute of 1878 does not permit, but impliedly prohibits such a course, in speaking of a "future suit" against the debtor; and certainly it is not and has not been the practice to ask for such judgment.

(*c.*) But this claim of the appellant reveals too much. In disclosing the possibility that a prayer for judgment for deficiency would be proper, it also shows that the foreclosure of a mortgage under our system, with the mortgagor as a party, *does settle every question, of record,* necessary to be settled, in order to render a judgment for the deficiency, so that it is but a question of *form,* whether

the judgment might be entered in the foreclosure suit or be the result of a "future suit."

The settlement of *all* these questions, it is the right of the plaintiff to obtain as against the original mortgagor who has parted with the equity, and by the general prayer for foreclosure, but it is *indispensable* to make such mortgagor a party in order to obtain such right. Still the contention of the appellant, is that though the plaintiff in a foreclosure case is entitled to all his rights, and though to that end he *must* make the original mortgagor a party, yet that after all, such mortgagor, is not an indispensable or necessary party!

It might as well be claimed that such original mortgagor was not an indispensable or necessary party in the "further suit" to get a judgment for the deficiency.

Of course, the original mortgagor must be a necessary and indispensable party, in the establishment of record, of the facts which are to form the basis of the "further suit," which is almost in the nature of debt on judgment.

If Mr. Carll is not an interested party, why is he appearing in the suit and resisting by a separate demurrer, the plaintiff's case?

Record, page 5. Fol. 15.

He does not appear to avoid a judgment for costs, for no such judgment can be had. Of course, he appears because of his personal interest.

(4.) But it is said there is no specific prayer for an appraisal, and there may never be an appraisal.

(*a.*) Suppose all this to be so, and yet it is still indispensable and necessary to make Mr. Carll a party defendant, if the plaintiff would preserve his rights.

(*b.*) But the right of an appraisal does not depend upon a prayer therefor. The Statute provides that it may be had "on motion," and, of course, in practice it is not pecifically prayed for.

The bringing of a complaint for foreclosure, is, of itself, under this Statute, sufficient to obtain the relief of an appraisal, but the same Statute makes it indispensable to cite in the mortgagor as a defendant, in order to obtain that relief. Schreiber vs. Carey 48 Wis. 208.

(*c.*) It is denied that any more specific relief should be

prayed for, in this, the usual form of complaint, in foreclosure, by our practice.

But the removability of a cause, ought not to and cannot depend, upon any narrow construction of the technical pleading, concerning the relief.

Any difficulty of that sort is easily remedied by amendment.

Nash *vs.* Adams, 24 Conn., 33–39.
Bulkley *vs.* Andrews, 39 Conn., 523.
Practice Act with Rules and Forms,
Page 18. Rule 6,

(5.) But it is said again, suppose Mr. Carll is an indispensable party to this foreclosure; on removal he goes with the case, and the plaintiff's rights, dependent upon the necessity of making Mr. Carll a defendant, will be preserved in the Federal Court.

But it is a poor consolation, that Mr. Carll is with us in the Circuit Court, as an indispensable party to preserve our rights, when the necessity of his being a party in the case, deprives that Court of its jurisdiction of all parties.

(6.) The principle which controls the decision of this case, was settled in Ayres *vs.* Wiswall, 112 U. S., 187.

The doctrine of that case is, that in foreclosure proceedings, the mortgage debt is the same unit for all parties interested; (and surely the ower of the debt is an interested party) that the controversy in foreclosure proceedings, is about the appropriation of the mortgaged property on *account* of that debt, implying, of course, the preservation of all rights, in case the debt is not entirely paid; that upon one side of that controversy is the creditor, and on the other side are the debtor and those whose property is incumbered for the debt, and that if citizens of the same State are found on both sides of that controversy, the cause is not removable.

The doctrine of that case does not depend upon the accident, that, in that case, the foreclosure proceedings were under State laws, which authorized the *sale* of the property.

The *reason* of that decision, is equally applicable to a foreclosure under the Connecticut system.

Indeed, under the act of 1878, our system of foreclosure

and that practiced in Ayres *vs.* Wiswall, accomplish substantially the same results and proceed upon substantially the same principles.

Swift's Dig., vol. 2, side page 198.

On the question of the applicability of Ayres *vs.* Wiswall to the Connecticut foreclosure, as, indeed, upon the whole question, as to whether Mr. Carll was a necessary and indispensable party to the case, we respectfully call the attention of the Court to the opinion of Judge Shipman, a man of large experience, both as lawyer and Judge, in the laws of Connecticut.

Record, page 10. Fols. 30–34.

Surely the indispensable character of Mr. Carll as a party, ought to be so clear, especially in the light of Ayres *vs.* Wiswall, as that a Connecticut Judge of the ability and experience of Judge Shipman, should make no mistake on that subject.

We therefore say of the first assignment of error;

The foreclosure of a mortgage, does not mean the *discharge* of the obligation of the mortgagor, to pay the debt, if the property does not pay it.

It means the appropriation of the property, if no redemption takes place, on *account* of the debt.

We "sought" for the "relief" of *such* a foreclosure, as *preserved the obligation* of Mr. Carll, and as would give us the right, to determine how much would be due on that obligation, after the expiration of the time limited for redemption.

It is not disputed that, on the complaint, as drawn, we are entitled to such "relief," and clearly it is not true "that the complainant might have obtained all the relief sought, in said suit, without making said Carll a party thereto."

Concerning the second claim of error, we say:

It would be more correct, to state this claim, by saying that IF the complainant had *elected* to make the foreclosure, a separate controversy, between himself and Mr. Coney, Mr. Carll, *in that event*, would have had no interest, because he would have been discharged of his obligation.

But Mr. Winchell did not so elect; it was indispensable to the maintenance of his rights, that he should not so elect; and no Court could force him, to make the matter of foreclosing this mortgage a separate controversy, between himself and Mr. Coney, or deprive Mr. Carll of the

"interest" he has, *in the controversy as brought* and in the payment of his debt, or of his right to pay the debt, and take the place of the mortgagee, in regard to the property, in case Mr. Coney declines to pay, or of his right to be heard, in this controversy, as brought, to the extent of protecting his interests.

II.

But it is said, that there is in this case a separate controversy between Mr. Winchell and Mr. Coney concerning the possession; that this suit was capable of being divided into parts, and on the part of the question concerning possession, Mr. Coney was entitled to remove the whole suit. This constitutes the ground of the third claim of error.

(1.) But with Coney and Carll in *joint* possession, this claim seems too absurd for argument.

Par. 4 of complaint, page 4. Fol. 12.

(2.) In the foreclosure suit, there can be no separate and distinct controversy on the single question of possession.

The controversy in such suit, as settled in Ayres *vs.* Wiswall, concerns the foreclosure of the mortgage.

It may incidentally follow, in some States, that a judgment for deficiency can be entered against one of the defendants, but this does not raise a separate controversy, giving a right of removal.

So, too, the determination of the main question and the failure to redeem, may incidentally, and, in order to give full and adequate relief, result in an execution for the possession, by the present Connecticut practice.

(3.) But the Supreme Court of this State in Savings Bank *vs.* Bacharach, 46 Conn., 526, settled the position, that there can be in a foreclosure case, no separate and distinct controversy on the question of possession, under the second statute above quoted. That is but an incident to the main question; a result from the determination of the main controversy; a giving of the *full* and adequate and *admitted* relief, to which the mortgagee is entitled, when all parties have failed to redeem.

See as to old law and practice Swift's Dig., vol. 2, side page 198.

(4.) It cannot be inferred or supposed, that there will be any controversy about possession, in foreclosure proceedings, under the Connecticut system.

If there be no redemption, or even if the Court should

find, on the passage of the decree of foreclosure, that the mortgage debt was so great, and the security so small, that the mortgagee should take immediate possession, and apply the rents and profits on the mortgage debt, pending the running of the period for redemption, questions peculiary appropriate to foreclosure proceedings, it would be wrong for Mr. Carll or Mr. Coney to withhold possession or to raise any controversy about the possession, and no law or Court will confer upon a party a *privilege*, based upon his *wrongful* act.

(5.) There can be no removal where the supposed separate cause of action, is ancillary to the main case, and indissolubly connected therewith, and only affects the *completeness* of the relief.

City of New York *vs.* Steamboat Trans-
Co., 24 Fed. Rep., 817.
Bank *vs.* Turnbull, 16 Wall., 190.

III.

Mr. Winchell was bound to make Mr. Carll a party defendant, in order to get the possession of the premises, and in order to foreclose his right, as possessor, to redeem.

(1.) The execution issues in the form of an ejectment

execution, and the necessity of making Mr. Carll a party, must be determined according to the rules in ejectment and the provisions of the Connecticut Statute of 1875, above quoted.

(2.) The record shows no personal service upon Mr. Coney. Mr. Carll is visibly in possession. Mr. Coney is in New York.

Record, page 5. Fol. 14.

The common law action of ejectment would be brought against Mr. Carll.

No service of such action could be made upon Mr. Coney.

The plaintiff in such action proceeds directly against the party, whom he finds to be in possession.

(3.) Again the Statute of 1875 provides, that the Court may, if it grant the general prayer of the petitioner, with regard to the foreclosure, and further find him entitled to the possession, issue its execution of ejectment,—*to eject the person in possession, but no execution shall issue against any persons in possession, who are not made parties to the petition.*

The averment of the complaint is that both Carll and Coney are in possession, and on this question of jurisdiction we take the averment as it is, though Coney was in New York and Carll in New Haven.

We certainly had the right to make Mr. Carll, the resident, and in visible possession, a party, so that our execution for the possession might run against him.

(4.) Moreover Mr. Carll does not disclaim possession, nor whatever rights he may have by such possession to redeem the mortgage, or to object, that he cannot be dispossessed unless made a party to the suit; and because he was in possession, he was an indispensable party, in order to afford the plaintiff complete relief, both in regard to cutting off the equity of redemption, and as well as the obtaining of possession under our Statute.

Our Statute concerning the execution for possession, in foreclosure cases, will be construed by the same principle, by which the Statutes and practice of other States, authorizing sale and delivery of possession, have been construed.

Many cases could be cited on this point; we select the following:

Allin *vs.* Robinson, 1 Dill, 119.
Richardson vs. Hadsall, 106 *Ill*., 476, 479.
Hirsch *vs.* Livingston, 3 Hun., 9.
Fuller *vs.* Van Geesen, 4 Hill, 171–174.
Buckner *vs.* Sessions, 27 Ark., 219.

IV.

If it be said, that the allegation of the petition for removal, that Mr. Carll is only a nominal party to the suit, is to be taken as literally true, we reply:

(1.) The real character of Mr. Carll as a party is to be collected from the complaint.

Winchester *vs.* Loud, 108 U. S., 130.

(2.) The averment of the removal petition as to the nominal character of Mr. Carll as a party, is but a conclusion of law.

Page 6 Fol. 16.

Extended, the averment would be, that it appears from the allegations of the complaint, that Mr. Carll is only a nominal party.

The averment is no denial, that Mr. Carll is the maker of the mortgage notes, or that he is the original mortgagor, *or that he appears, and denies our right to relief.*

V.

We do not intend to be drawn into a detailed discussion of the learning, concerning formal, necessary or indispensable parties.

It will be found discussed in

Kendig *vs.* Dean, 97 U. S., 423.
Barney *vs.* Baltimore City, 6 Wall, 280-5.
Shields *vs.* Barrow, 17 How., 140.

and many other cases therein cited. We avoid this discussion:

First. Because the Supreme Court has given the profession, a rule of removability, found in Frazer *vs.* Jennison, and Ayres *vs.* Wiswall.

Clearly there ought to be a rule on this subject, at least in foreclosure cases, so clear that an average lawyer should, by this time, know with as much certainty, whether the cause was removable, as to what Court, he might safely bring his case at the outset.

The rule in Frazer *vs.* Jennison is easy of comprehension and *application*, and doubtless will be made the test rule in this class of cases.

Second. The Federal statute, in question, uses no words of "necessary" or "indispensable" parties.

The separate controversy is to be "*wholly* between citizens of different States," and one which could be "*fully* determined" in a suit between them, without the presence, as parties, of citizens of the same State, on both sides of the controversy.

Third. The cases, in which the distinctions between necessary and indispensable parties, have been heretofore discussed, have been cases, where the question was whether the Federal Court, in a suit before it, between citizens of different States, could in such suit render judgment, where it appeared, there were other persons, not made parties, and who, if made parties would render the suit not wholly between citizens of different States and so defeat the jurisdiction of the Federal Court, but who might be termed proper or necessary parties, to the subject matter, in suit, but were not such parties, as were *essential* to the disposition of the case, or whose rights would be directly affected by the decision of the Federal Court.

In such cases, it is claimed that the Federal Court has proceeded to judgment, in some instances.

But if the presence of other parties, was *essential* to the disposition of the case,—if their rights would be directly affected by the judgment, such parties were called indispensable, and the Federal Court, if it could not get jurisdiction of such parties, must dismiss the suit, without prejudice.

Fourth. It is not believed however, that a suit can be *originally* brought to a Federal Court, on the ground of diverse citizenship, in which there should be on both

sides of the suit, citizens of the same State, although they might fall within the class of proper or necessary parties.

Equity Rule 47.

The *presence* of such parties, in the case would deprive the Federal Court of jurisdiction. The case thus supposed is entirely different from the case where the Federal Court *has* jurisdiction of the parties, and the objection is that other parties ought to be, but cannot be made parties to the suit.

Nor has the original jurisdiction of the Circuit Court on the grounds of diverse citizenship of the parties, been enlarged by the act of 1875, or by the directions for service upon absent defendants.

Coal Co. *vs.* Blatchford, 11 Wall, 172.
Case of the Sewing Machine Co.'s, 18 Wall, 553.
Blake *vs.* McKim, 103 U. S., 336, 338.

Certainly if Mr. Winchell had brought this foreclosure suit to the Circuit Court of Connecticut, and had attempted to make Carll a party thereto, the Circuit Court would have had no jurisdiction of Mr. Carll, nor could he have had any of the rights of a party.

Attempting to bring a person into Court, as a party,

where the Court can have no jurisdiction over him, is the same as not citing him at all.

Had Mr. Winchell therefore attempted to bring this foreclosure in the Federal Court, he would have thereby released Mr. Carll from personal obligation on the indebtedness.

Fifth. It is believed, that it is sufficient to prevent a removal that the resident is a necessary or proper party, but whether so or not, a person situated as is Mr. Carll, who *must* be joined, in order that the cause be *fully* determined—who must be made a party, in order to preserve the plaintiff's rights—is according to all the definitions, an indispensable party. If he *must* be, a party, he is "indispensable."

VI.

We do not at present criticise in detail the removal cases, which were cited in the Court below, by the appellant.

First. Because the question being to apply the rule of Frazer *vs.* Jennison and Ayres *vs.* Wiswall, to the circumstances of this case, that question does not seem to us, so difficult, as to call for criticism as to whether that rule has been correctly or incorrectly applied to cases, of dissimilar circumstances.

Second. Because, the cases which may be cited, to show, that a mortgagor who has conveyed his interest in the mortgaged premises, is not a necessary party to a foreclosure suit, have no application where it is sought to make the mortgagor responsible for a possible deficiency; much less to a foreclosure brought under the Conn. Statute of 1878.

Third. This case comes clearly within that class of foreclosure cases, in which the liability of the mortgagor, for a possible dificiency, is to be *preserved* or *enforced*, and in which it has been held both on principle and authority, that the mortgagor is an indispensable party, though he has parted with the equity of redemption.

Ayres *vs.* Wiswall, supra.
Robertson *vs.* Carson, 19 Wall, 94, 105–6.
Hallock *vs.* Smith, 4 Johns, Ch., 649.
Milroy *vs.* Stockwell, 1 Ind., (Carter,) 35.
Huston *vs.* Stringham, 21 Iowa, 36–41.
Worthington *vs.* Lee, 2 Bland, Ch., 678, 681–3.
Crenshaw *vs.* Thackston, 14 S. C., 437.

And whatever rule may prevail in other States; in Connecticut, where the plaintiff in foreclosure, seeks to preserve and settle his rights against such a mortgagor, the

Statute makes it indispensable, that the mortgagor be made a party, and it is not to be understood, how any number of decisions in other States, that such a mortgagor, may not be an indispensable party, can, in Connecticut, override or annul the Connecticut Statute.

Furthermore no case can be found, where it has ever been claimed or ruled, that a plaintiff in foreclosure could obtain a judgment for deficiency, against a mortgagor, who had parted with the equity, unless he made such mortgagor a party. To obtain such relief, such mortgagor is indispensable as a party defendant.

The principle of the Connecticut Statute, is, likewise, the same that requires that the rights of no person shall be affected in a proceeding, to which he is not a party. It is a reasonable Statute, and should be favorably considered.

VII.

Finally the Federal Courts are not anxious to acquire jurisdiction, by removals from State Courts.

The harmonious and successful working of the State and Federal Courts requires the utmost respect for their

several jurisdictions. The fundamental law prevents either from interfering directly with the other.

The Federal Court will not, and ought not to accept jurisdiction by removal from a State Court, in any case, which does not, *satisfactorily*, come within the legal requirements for such removal.

In the removal act of 1875, Congress had in view, as much the right of *home* litigants, to litigate in the State Court, as the right of the non-resident to remove to the Federal Court.

Where there should be, in a controversy, a subject matter, which, as between the resident and non-resident, *might* have been sued in the Circuit Court, and complete relief obtained, there the resident, shall not deprive the non-resident of his trial in the Federal Court.

But where the resident, must, as in this case, bring his suit to the State Court—where the affairs of the non-resident, are such, that with him must be joined as a party, a resident, it was not the general intention of Congress, that there should be a removal.

Uncertainty of jurisdiction is one of the worst evils, in enforcing the rights of parties.

Nothing can be more as it should not be, than to say to a plaintiff:

"You must first bring your suit to foreclose your mortgage to your State Court. Perhaps a non-resident party,

may try to remove the cause to a Federal Court. You cannot by consent confer jurisdiction on the Federal Court."

Ayres *vs.* Watson, 113 U. S., 594.

"Perchance you will find your case in suspense in both Courts, and must go to the Supreme Court of the United States, in order to settle the initial step in your effort to obtain your rights. Or if, the Circuit Court assumes jurisdiction, you must remain in doubt, as to such jurisdiction, certainly if the amount in controversy is above $5,000, until the final judgment in the Circuit Court, and the settlement of the jurisdictional question, in the Supreme Court—a process of years."

It has happened that a Circuit Court has assumed jurisdiction and made a wrong decision, while the State Court proceeding with the case, decided it rightly on the merits, and both final judgments were reversed in this Court—the judgment of the Circuit Court on the merits, and that of the State Court for want of jurisdiction.

Removal cases, 100 U. S., 457.

So that it has justly and properly been decided, that where the right of removal from the unquestionable jurisdiction of the State Court is *doubtful*, it will not be allowed.

Evans *vs.* Faxon, 10 Fed. Rep., 312.

Wolff *vs.* Archibald, 14 Fed. Rep., 369.

Opinion of Mr. Justice Miller in R. R. Co. vs. Mississ, 102 U. S. 141.

This rule is peculiarly applicable to foreclosure cases, in this State, which are to a great extent, controlled by laws peculiar to this State; to which, in most cases, there is no defense; and where, generally, the principal object, sought by the removal, would be to put off and delay the plaintiff.

The terms of the Circuit Court in this State, are such, that in many cases a removal would cause at least a delay of six months, in which no progress could be made, not even the procuring of an answer; and it is hoped that the door will be shut against the possibility of such delays.

We submit, therefore, that judgment on the appeal should be for the appellee for his costs and damages, and that the judgment of the Circuit Court be affirmed.

JOHN W. ALLING,

Attorney for Appellee.

116-22

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1016.

ADVANCED UNDER RULE 32, ON MOTION OF APPELLEE.

GEORGE E. CONEY,

Appellant.

vs.

ALVERD E. WINCHELL,

Appellee.

REPLY TO BRIEF OF APPELLANT.

JOHN W. ALLING,

Of Counsel.

Hoggson & Robinson, Law Printers, 82 Church-st.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1,016.

GEORGE E. CONEY,
Appellant,

vs.

ALVERD E. WINCHELL,
Appellee.

NOTES OF APPELLEE, IN REPLY TO BRIEF OF APPELLANT.

As this cause was advanced upon our motion, and we filed the first brief, we beg leave to submit the following notes, upon the Brief of Appellant.

Note 1.

It is claimed that Mr. Carll is interested, on the same side of the foreclosure, as the plaintiff.

Appellant's Brief, page 19.

(1.) If Mr. Carll is so interested, we have not heretofore, with the use of the utmost diligence, on the part of Mr. Winchell, discovered the fact.

On the contrary Mr. Carll appeared to oppose the cause, (Record, page 5, fol. 15), and by the same counsel, who subsequently appeared for Mr. Coney, (Record, page 6, fol. 15).

A Court may *theorise* as to where the interests of Mr. Carll ought to be, the *fact* is, as appears by the record, that Mr. Carll considers his interest as opposed to the foreclosure.

(2.) Nor can the Court judicially say, that Mr. Carll's interests necessarily lie with the plaintiff.

He may be opposed to the plaintiff's claim as to the amount of the debt, or as to the amount of payments, or he may have a defense to the debt. And if there is no defense to the debt, nor dispute as to its amount, nor as to its being due, *neither* of these defendants should meet with any favor, in their attempt to take the case to the Federal Court, on the single question of the time to be limited for redemption.

If there is no controversy as to the debt being due, or as to whether if due, its lien by mortgage, can be presently enforced, Mr. Carll may be interested, in preventing an

immediate foreclosure. He may think that now, is not the time, at which the property should be foreclosed.

The property may not now be redeemed, and the entire equity will be cut off, for non-payment of interest, and the value of the entire property, may have *now* to be taken, as applicable to the whole debt, and Mr. Carll may think that, now is not the time, for his interests, to have the debt applied on the property.

(3.) This Court cannot re-classify the parties, in this cause, from the positions they have taken, by their pleadings on record, and it is submitted, that the issues formed by the pleadings, must determine who are plaintiffs and who are defendants.

Winchester *vs.* Loud, 108 U. S., 130.

Those issues were closed in this case before the attempt to remove.

Rules under the Practice Act, page 17, sec. 12, provide that no issue need be joined on a demurrer, and the demurrers filed are, under such rules, the equivalent in Connecticut, of the usual demurrer; that upon the facts stated there is no cause of action.

Vide, sec. 12, page 17, of "Practice Act," and the form on page 199.

(4.) If this Court should unnecessarily attempt to re-classify the parties, from the positions they have taken in the pleadings, upon what other general principle can it be done than that, in a proceeding by a plaintiff creditor, seeking to preserve and maintain a claim against a defendant debtor, the creditor and debtor are naturally classified as plaintiff and defendant?

Will it not require an extraordinary condition of things to classify them on the same side, especially when they are opposing each other, on the pleadings?

Note 2.

We do not claim, that a mortgagor like Mr. Carll, is the owner of the technical equity of redemption.

Appellant's Brief, pages 15–17.

We do insist, however, that as the only object of a mortgage, is to secure the payment of an indebtedness, when a mortgagee brings into Court a mortgagor like Mr. Carll, for the purpose of preserving his liability on the notes, such mortgagee would be clearly estopped, from refusing to receive payment of his debt, from such mortgagor, the minute after the time had expired, for the technical owner of the equity to redeem.

We claim, that it never was the *sole* object of the statute of 1878, to provide for an *appraisal* of the property, after the time limited to redeem.

Section 1 is explicit:

"The foreclosure of a mortgage shall be a bar, to any further suit or action upon the mortgage debt, note or obligation, unless the person or persons, who are liable for the payment thereof, are made *parties* to such foreclosure."

The statute says to the mortgagee, you shall not hold the debtor liable, beyond his pledge, unless you make him a *party* to the proceedings, by which the pledge is to be appropriated.

It was not, in our judgment, the substantial mischief to be remedied, that in further actions upon the debt, it might be difficult to ascertain, what was its value at the time, the title of the creditor thereto became absolute.

The statute provides no certain remedy for that mischief.

The appraisal may or may not be had, by either party. There is no certainty about it.

The mischief of future uncertainty about the value of the pledge may still continue, and it seems strange, that if the *sole* object of the statute, was to remedy such mischief, it did not surely do so.

On the other hand section 1 is entirely independent of section 2.

Section 1 on the very face of it, discloses the reason for its passage.

In a proceeding to foreclose a pledge, for a debt, you must make the debtor a *party*, or release him from liability.

This is equitable, on general prineiples, and never has been said to be otherwise.

Now what does the statute mean, by providing that the debtor shall be made a ' party, to such foreclosure?"

He is not to be brought in as a party *after* the decree, or after the time limited for the redemption, as would have been sufficient, if the appraisal was the only object to be accomplished, by this statute, but he is to be a party to the *foreclosure proceedings, from the beginning to the end.*

If he is to be held liable, for the debt, of course he must be and is interested, in the *entire* proceedings, by which the pledge is to be appropriated, and by statute he must be made a party to the entire proceedings.

It seems to us clear, that as his actual interest in such proceedings is not formal, nor nominal, nor impersonal, but real and intensely personal, the statute, in requiring him to be made a party, to the whole proceedings, gives to him, when made a party by the creditor, the rights of a party as against such creditor, to whatever "should belong to him in defending or securing him against the liability

which the plaintiff seeks to impose upon him," and among other rights, the right to pay the debt, if the technical owner of the equity does not.

In City Savings Bank *vs.* Kutscher, Part 3 of 52 Conn., 407 (not issued as yet in whole vol., but Part 3, to be found in Congressional Library), the points decided were, that the foreclosure proceedings therein referred to, were pending when the Statute of 1878 was passed, and therefore by the 3d section of that statute, (which provided, that pending suits should not be affected,) were not affected by that statute, and it was therefore held that an appraisal made in those proceedings, acquired no validity under the statute.

The *sole* controversy in that case was as to the validity of such appraisal, and the construction of either section one or section two, was not in issue, nor hardly discussed.

But the Court in giving the opinion, say that the foreclosure in that case was brought under the "old" law, and the full sentence, part of which the appellant quotes, on page 15, is as follows:

"The defendants were not necessary parties to it" (*i. e.* the foreclosure under the "old" law); "a valid decree effectually extinguishing the equity of redemption, could have been passed without them; and *with them*, under the *old* law, no interest of theirs was affected, except perhaps *that the amount of the debt was conclusively ascertained.*"

Now if under the "*old*" law, with such mortgagor as a party, the amount of the debt would be conclusively ascertained, is it not certain under the "*new*" law that, with such a mortgagor, as a party, to the whole foreclosure proceedings, *the amount of the debt must be conclusively ascertained as to such mortgagor;* and we leave it for the appellant to explain, how there can be a settlement of the interest due on the principal, and not a settlement of the principal.

There has been no decision, in this State, upon the construction of this statute, as to the matters now at issue.

It may therefore be inferred that the obvious and plain meaning of this statute, has been adopted by the profession, and though appellant on page 16, would seem to say our statement of the practice is incorrect, we can only reaffirm, that such is our practice, we know it to be the practice of the others, and and we know of no contrary practice.

Nor do we see the distinction, in providing in the decree, that the debtor may pay, after the time of the owner of the equity has expired, in cases where the "grantee had assumed and agreed to pay the debt," and no such provision in cases like the present, as suggested on page 16 of Appellant's Brief—nor do we believe the practice is governed by such a distinction.

But whether we are correct or incorrect, on the point that such mortgagor should be allowed, in the decree a chance to pay the debt, if the owner of the equity does not, *he clearly has the right to pay it, with or without such a provision, up to the expiration of the time limited for the redemption*, and it may be, or what is the same thing, he may think it, most decidedly for his own interest to pay the debt, after it has been conclusively established, or before, and take an assignment of the mortgage, rather than to have a liability held over him.

Therefore it is, that he is to be made a party, so that he may be heard as to the amount of the debt; may be heard as to the time to be limited for redemption, and know what that time is; so that he may know of the whole proceedings, and may be governed throughout the proceedings, which in fact affect his interest, by what he deems his interest to be, nor is he such a singular "party" that he can say and do nothing, until the decree has been passed and the title become absolute.

Again, whatever may be the rights of Mr. Carll under the Statute of 1878, it is hardly the province of this Court to determine, in the first instance.

Is it not sufficient to say, that by this statute, Mr. Carll is indispensable as a party.

In Railroad Co. *vs.* Wilson, 114 U. S., 60, the jurisdiction of the Federal Court was defeated by the residence of a party, who was personally *indifferent*, to the result of the real contest between the resident and non-resident, but whose presence as a party was indispensable, to the judicial settlement of that contest.

Bailey *vs.* Bank, et al., 18 Blatch., 77.

So in this case, the foreclosure of this mortgage, in the "suit as it has been begun," cannot be judicially settled without the presence of Mr. Carll as a party.

Note 3.

We observe the emphatic denial on page 11 of appellant's brief.

"Emphatic denials" are commonly very poor arguments.

On page 85, of Practice Act, is a case of a foreclosure of a judgment lien.

The Statute, in Public Acts of 1878, page 294, sec. 5, provides that "any such" (judgment) "lien may be fore-foreclosed or redeemed in the *same manner as mortgages.*"

The Form supposes a case where the judgment debtor, had conveyed his interest in the lands, and for

relief, simply prays a "*foreclosure of said judgment lien against all the defendants.*"

The appellant does not suggest any reason, why this mortgage cannot be foreclosed in the case as brought, and we preserve all our rights against Mr. Carll.

The Statute says we must make him a party, and we have done so. We have also set out that he was the maker of the notes, and we have prayed for a foreclosure of the mortgage, on the land, according to the facts stated.

What more need we do? Put it to this simple test.

Suppose we get a decree of foreclosure, and the *time limited for redemption expires, and nobody pays, and nobody asks for an appraisal, is not Mr. Carll holden for whatever the mortgaged property does not pay? If not, why not?*

We still affirm our right to an appraisal, in this case, on this complaint, if we obtain the decree of foreclosure, and if nobody pays the debt.

The Statute of 1878 explicitly states that the appraisal may be had on the "*motion of any party to a foreclosure.*"

The origin of the appraisal is by Statute, and the method of obtaining it is also, by Statute.

Mr. Carll, undoubtedly, would not have to lay the basis, for an application for an appraisal, by a cross bill, plea or answer.

He could have it on "motion."

The appellant seems to admit this, but to claim, that the *plaintiff* could not have an appraisal, unless he prayed for it, when he brought his suit.

But by statute the plaintiff may have the appraisal, on the same terms as Mr. Carll, to wit: by "motion."

The statute proceeds upon the theory, that neither party may wish for an appraisal; that the time to decide that question, does not arise, until, at least, the decree is passed, and probably not until the time of redemption has passed, and then it may be had by *any party* on motion; (all this showing that the central idea of both sections was not the appraisal.)

But the appellant is clearly sticking in the bark. He admits that all the facts necessary to grant the relief of an appraisal are stated. He must admit that Mr. Carll is made a party, under the Statute of 1878, for the purpose of preserving his liability, and we submit, with entire confidence, that it will not be held, that this cause would not be removable, if a purely formal prayer for an appraisal, had been inserted in the complaint; and is removable, not because the object and purpose of the suit, are not understood, but because of such formal omission.

If it "be always a matter of delicacy, when a cause of which a Court has undoubted jurisdiction, is transferred, at the instance of one party, to another Court of concurrent jurisdiction;" if "it is especially so when the transfer is to be made to a Federal from a State Court, without regard to the consent of the latter, and against the objection of the other party," as Mr. Justice Miller says, in Railroad Co. *vs.* Mississippi, 102 U. S., 142, the jurisdiction of the State Court will not be defeated, by the extremely doubtful position, that an appraisal cannot be had "on motion," unless there was a specific prayer for an appraisal at the commencement of the suit.

If in a foreclosure case, a receiver of the mortgaged estate may be appointed on motion, after judgment, without a prayer for such relief, as was held in Schreiber *vs.* Carey 48 Wis., 208, much more under this statute, any party to this foreclosure, may have it, when the time comes, on motion.

Note 4.

It is too absurd even for the appellant, to claim, that there should be a provision in the decree, that the liability of Carll should continue. Decrees, except perhaps in construction of wills, never announce pure conclusions of law.

The Statutes of Conn., Rev. of 1875, page 358, and the Statute of 1878, take care of this question.

That liability is preserved by the *law*, if Carll is made a party to the foreclosure.

It is equally absurd to say that the decree *must* provide for an appraisal.

To test it, conceive how such a provision would be framed. It could be no otherwise than this in substance: "And it is further provided that either party, may, *on motion*, apply for appraisers," etc.

What is this but a pure announcement of law,—a repetition of the statute, neither conferring or taking away any right.

It seems to us, that the position of the appellant, as to the indispensable character of Mr. Carll as a party, is not so far removed from our own, as might at first sight appear.

The appellant does not say, that if Mr. Winchell wishes to foreclose his mortgage, and preserve his claim against Mr. Carll, it is not indispensable to make Mr. Carll a "party to the foreclosure."

His contention is that, in this case, as brought, Mr. Winchell cannot preserve his claim against Mr. Carll, although

he may get his foreclosure, because forsooth, he has not asked the Court, to announce in the decree, what the legal status of the parties may be, as to the continuance of Mr. Carll's liability, and, as to the right, of either party, on motion, to claim an appraisal.

Though his criticisms do not take this form, in substance they come to the result, of claiming that Mr. Winchell should have asked for such a decree.

We contend that the prayer for such relief is wholly unnecessary, and that the prayer in the complaint is amply sufficient; that when the decree of foreclosure, is had, under this complaint, Carll will continue liable, and either of us, on motion, can have the appraisal.

We further contend that the removability of a cause, from the undoubted jurisdiction of a State Court, does not depend upon such extremely nice questions of pleadings.

All such questions, should be resolved in favor of the certain jurisdiction of the State Court.

It would be a refinement of cruelty to litigants, to resort to such distinctions, to defeat the jurisdiction of the State Courts, with the result of making the jurisdiction in either Court, so uncertain that it could not be settled by consent, or ascertained short of a resort to this Court.

The appellant further contends, that though, in a complaint, exquisitely drawn, Mr. Winchell might foreclose his

mortgage, and preserve the liability of Mr. Carll, by making him a party, and though he would then be indispensable as a party, yet after all, he would probably have so little to do with the case, that he should be discarded as a party.

We say that there is ordinarily very little for any party to do, in a foreclosure by our practice, and no reason whatever, why the State Court cannot do it, in this or any other case of foreclosure.

We say, however, that in fact and under the statute of 1878 Mr. Carll has well nigh as much, and may have more to do with the case than Mr. Coney.

We further contend that the removability does not depend upon the extent of the interest, but upon the necessity or indispensability of Mr. Carll as a party.

The test question is, can the suit as it has been begun, be *fully* determined, without him.

Removability should be determined so far as possible by rules.

If removability is to be determined by subtle distinctions, there is hardly any case, in a State Court, where there is a non-resident, but that there may be an attempt to remove, and the flood of litigation, on this question, already high enough, will become disastrous.

It is sufficient, when it is ascertained that Mr. Carll *must* be a party, in order to grant the relief, to which upon the facts stated in the complaint, fairly, perhaps liberally, construed, the plaintiff is entitled, In such case there is no removal.

The case stated in the complaint, will not be criticised in "any technical or narrow sense," but the Federal Court will look "rather to the real object of the plaintiff in bringing the suit," and look "also at the extrinsic circumstances of the case, with a view of ascertaining the real purpose for which the suit was brought."

Nash *vs.* Adams, 24 Conn., 39.

The Federal Court is not jealous of the State Court, nor in need of its business.

The Federal Court cares not why it is, that Mr. Carll *must* be a party, but only that the fact be so or not.

So in the construction of the statutes of 1878, and 1875, the Federal Court will not result to subtle distinctions.

It will take their obvious meaning, as Judge Shipman did.

The statute of 1878, says, that under the conditions, understood to exist in this case, such persons as Mr. Carll

must be made "*parties* to the foreclosnre;" not garnishees, as in Bacon *vs.* Rives, 106 U. S., 99–104.

Why is not this sufficient, without further speculation, as to all the as yet unascertained rights of Mr. Carll as a party?

We cannot bring our foreclosure and preserve our rights without him, as a party.

Why then should the jurisdiction of the State Court be defeated?

There is then left, but one other question, and that is whether there is any other cause of action, than the non-payment of the debt, for which the general remedy of the foreclosure is asked, and which other cause of action, is wholly between Mr. Winchell and Mr. Coney; a point argued in the first brief, and to be noticed more hereafter.

So far as the separable controversy is claimed to exist solely between Mr. Coney and Mr. Winchell, concerning the foreclosure, the statute, with exact precision, says, that Mr. Carll must be made a "party to such *foreclosure.*"

That cannot be a sole and separate affair between Mr. Winchell and Mr. Coney, nor is there any good reason

why it should be, nor why Mr. Carll should not be a party, with the right to be heard as a party, with reference to all the foreclosure proceedings.

We also understand it to be well settled in this State,—Savings Bank *vs.* Bacharach, 46 Conn., 526,—that the "foreclosure" as an incident, embraces the putting of the mortgagee into possession, and to such "foreclosure," by statute, Mr. Carll must be made a party.

Note 5.

We therefore join issue with the position of the appellant, as stated on page 17 and assert:

(1.) That Mr. Carll is an indispensable party, under the Statute of 1878, in order to afford the plaintiff complete relief.

(2.) That when so joined as a party, under the Statute of 1878,—under the "new" law, he is interested as a party, in the subject matter of the suit, to wit: the appropriation of a pledge, he once made, on account of a debt, for which he continues liable.

(3.) That he will be directly affected by the decree, as to the amount of the debt, and in other particulars.

(4.) That we can obtain, having complied with the statutes in this case, as brought, such a foreclosure, as continues the liability of Mr. Carll, and that we could not do so without him, and that by joining Mr. Carll as a party, we are clearly seeking such a foreclosure, and that the decree of foreclosure, in this case as brought, will secure for us, what we seek to obtain, and further give us the right, if no payment or redemption takes place, on motion, to have the pledge appraised.

Note 6.

(1.) We charged, in the State Court, in May, 1885, (Record page 7, fol. 20,) that the demurrers were manifestly frivolous.

We made the same charge in the Circuit Court in September Term, 1885, Record, page 10, fol 26.

Those charges were made in good faith, and it is a fair inference from the records, that the point of the demurrers was not explained.

Our claim on those charges, was that the records in fact disclosed no *controversy*, and that there must appear to be a real substantial controversy, before there can be a removal.

We still think that the demurrers, though, in form, presenting a point, have no substantial merit, and were intended for delay.

But we thought and felt, in preparing the opening brief, which, by the failure of the appellant to move for the ad-

vancement of the cause. we were obliged to do, some explanation of those charges, appearing on the *record*, was due to the Court, the opposing counsel and ourselves.

It will not do for the appellants to say, that the point of the demurrers was so fine, that it was going out of the record to explain it.

It was entirely proper to state, when we discovered the poiut, so as to explain, why we claimed in the State and Circuit Courts, that there was no controversy, because the demurrers were manifestly frivolous, and did not now press that claim.

The only other statement, was that the State Court had permitted the amendment, but that was said, in arguing, that the defect, if any, could be reached by amendment, and was something like the citation of an authority in point, and then we added, that whether "amended or not, could not affect the jurisdiction of this Court.

We deny that we have offended the spirit of the rule, concerning matters *de hors* the record, and the best proof of that is that the appellant does not complain that the rule has been violated, in spirit.

The opposing brief subsequently filed, page 27, seems to concede that the question of the amendment was immaterial.

(2.) It is difficult, therefore, to understand how our alleged but immaterial departure from rule, justifies the

intentional and deliberate assertion about Mr. Carll's disclaimer, by the appellant, on page 19, of his Brief, an assertion, which they italicise, in order, as we suppose, to make it clear, that it refers to a fact, *de hors* the record, and with no intention to influence the Court, upon the matters directly involved in this case.

(3.) This Court will take no heed to anything not appearing of record, in deciding this appeal, no matter, who first transgressed.

(4.) Moreover this disclaimer was filed in the *State* Court, after the remanding.

This appeal was from the doings of the *Circuit* Court, in which no such disclaimer was ever filed.

Error in the Circuit Court, cannot be predicated from the subsequent action of the appellant, in the State Court.

(5.) Besides the disclaimer is not as broad as stated. As we think, it admits, to be true, that Mr. Carll is joined as a party to preserve his liability on the notes, and so admits all the ground, on which Judge Shipman remanded the cause.

That part of the disclaimer is as follows:

"And this defendant (Carll) further says, that he is not interested in said suit, except as he is the maker of the

three notes dated May 10, 1881, and liable to be hereafter sued thereon, and that if said real estate should be foreclosed, he would, in case such other suit were ever brought, be entitled to have the value of said property applied upon such liability, and be relieved therefrom to that extent."

(Clearly he understands his liability is being preserved.)

(6.) The disclaimer was filed, in connection with a second application to remove, made after the remanding and after argument of the demurrers had been commenced, as such second application states, and therefore came too late, upon the doctrine of Scharff *vs.* Levy, 112 U. S., 711, and other cases. Certainly we cannot try that second application now.

(7.) The appellant omits to state, among other things, that Mr. Winchell has joined issue with him, on that disclaimer; the averment of Mr. Winchell, being in the following language:

"Second defense,—The disclaimer of the said Carll is merely colorable, and notwithstanding said disclaimer, said Carll has a substantial interest as owner in said mortgaged premises, by virtue of some parol understanding between said Carll and his son-in-law, the said Coney, substantially to the effect, that when said Carll or the said mortgaged premises shall have repaid said Coney, the sum of about $1,000, which he advanced to take up a mechanic's lien of one Kiel, on the premises, then the interest of said Coney in said property shall cease."

To which the appellant has replied,

"The second defense is denied."

And this issue of fact is not yet tried.

We admit, and make our apology, for having in the first brief, even in an explanatory and immaterial matter, made statement of any fact *de hors* the record, and contend that this case should be heard on its own record, but respectfully submit, that after the statement of the appellant on page 19, we are compelled to say, what we have said about the disclaimer, and what it seems to us, the appellant should have stated, when he intended to travel out of the record.

Note 7.

It is said, that when an appraisal is had, if either party ever moves for it, Mr. Coney will have ceased to be interested in that question.

The same is true, in all cases of foreclosure, where a sale is had, and judgment for deficiency is rendered against the mortgagor who had conveyed his equity.

When such judgment is rendered the owner of the equity, will not be interested in that question.

This, however, does not affect the right of the plaintiff to have all the remedy, to which he may be entitled on a foreclosure, or make such owner and mortgagor, any the less indispensable parties to the foreclosure.

Note 8.

Middletown Savings Bank *vs.* Bacharach, 46 Conn., 522, cited on page 26, of appellant's brief, concerns the statute of 1875, but not the statute of 1878.

Note 9.

Obviously, the statement of the complaint, "who," (*i. e.*, Coney), with the said Carll is now in possession of the premises, means just what Judge Shipman says, (Record, page 11, fol. 30):

"Carll and Coney are alleged to be in possession of the mortgaged land."

It is splitting hairs to say that the expression is not the equivalent of:

"Both Carll and Coney are in possession."

How Carll came to be there is not stated. It is sufficient that he is there.

The arguments and cases and statutes of venue, cited on pages 28 to 32 of Appellant's Brief, it seems to us, have no bearing on the question at hand.

Those cases refer to the construction of words under other circumstances, and as has been said, "more than half the words in the English language, depend for their meaning, on the context."

The plaintiff finds Carll in possession. What rights as

possessor he may have, the plaintiff at the outset of this case might not know, the Circuit Court could not know, and the appellant so feels the force of the argument, that he tells the Court, Mr. Carll has disclaimed possession in the State Court, since the remand.

We still maintain, against the argument of the appellant, pages 32-37, disclaimer and all, that if Mr. Winchell, as incident to his general relief of foreclosure, desired to obtain possession, he must have made Mr. Carll a party. He is the only person, indeed, whether as agent of Coney, or otherwise, whom we could find in this State, to deliver us the possession, or whom we could put out on process.

Note 10.

The appellant endeavors to show (pages 37-45), that there is stated in the complaint two controversies, or two causes of action, or two subject matters of dispute.

There is but *one* grievance alleged, to wit, the non-payment of the interest on the mortgage debt.

That being conceded or established, all else is matter of remedy.

We have asked for only *one* general remedy, the foreclosure of the mortgage.

As *incident* to that remedy, as a necessary consequence from it, if no redemption takes place, we are entitled to the possession.

But the remedy for possession, is but an incidental remedy, for the *single* cause of action stated—*i. e.*, the non-payment of interest on a mortgage debt.

As Judge Shipman states it:

"There is, as in the case of Ayres *vs.* Wiswall, 112 U. S., 187, 'but one cause of action'—the mortgage and the debt which it secured."

Page 11, fol. 33.

A remedy, incidental and necessary to giving complete relief, (which, if redemption takes place, *is unused*), for a *single* cause of action, does not make two causes of action, and all the ingenuity of appellant cannot make it so.

JOHN W. ALLING,

Counsel for Appellee.

In addition to the cases cited on Page 32 of our first Brief, we beg leave to refer to, Stevens vs Campbell 21. 2nd 441

116-227

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1016.

GEORGE E. CONEY, APPELLANT,

vs.

ALVERD E. WINCHELL, APPELLEE.

MOTION TO ADVANCE BY THE APPELLEE.

In the above-entitled cause, Alverd E. Winchell, the appellee, respectfully states that the cause in this court is an appeal by the appellant from an order of the circuit court held in the district of Connecticut, remanding a certain cause wherein said Alverd E. Winchell, a citizen of Connecticut, is plaintiff, and the said George E. Coney, a citizen of New York, and one Peter R. Carll, a citizen of Connecticut, are defendants, to the superior court of Connecticut, from which superior court the said Coney had attempted to remove said cause into said circuit court, as by the following extracts from the appeal of said Coney to this court appears:

"That on the 17th day of September, 1885, a decree was made and pronounced by said circuit court in said cause, wherein it was in substance adjudged and decreed that said Peter R. Carll was a necessary and indispensible party to said suit, and that there was no separate controversy between the complainant" (the said Winchell) "in said suit and the appellant, and that said cause was improperly removed to

said circuit court and should be remanded to said superior court.

"Wherefore the appellant appeals from the whole of said decree of said circuit court, and respectfully prays, * * * that the said decree of the said circuit court and every part thereof may be reversed, and a decree made removing said cause from said superior court to said circuit court."

The appellee further states that the question of jurisdiction, raised by the attempt to remove said cause to the circuit court, is such, that it was not possible that, by consent of the appellee, the circuit court could have acquired jurisdiction of the cause; and that a speedy determination as to whether the circuit court, by the proceedings for the removal, did acquire jurisdiction of said cause, is a matter absolutely necessary for the protection of the rights of the parties in said cause.

Wherefore the appellee, under rule 32 of this court, moves that the cause be advanced, to the end that a speedy determination of the same may be made.

Dated at New Haven, October 12th, 1875.

ALVERD E. WINCHELL,
By his attorney JOHN W. ALLING.